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In the

Supreme Court of the United States

October Term 1996

CHARLES G. MILDEN and
SUSAN P. MILDEN, debtors,
Petitioners,

vs.

JAMES J. JOSEPH, Trustee,
Respondent

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

***

PETITION FOR WRIT OF CERTIORARI

***

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SUSAN P. MILDEN, both *pro se*
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156 pp

QUESTIONS PRESENTED FOR REVIEW

1. Are the Office of the United States Trustee, the United States Bankruptcy Court for the Central District of California and the United States Court of Appeal for the Ninth Circuit administering and interpreting the U.S. Bankruptcy Code (Title 11) in contravention to the rights of U.S. citizens as protected by the U.S. Constitution?

2. Have the federal courts below, by their acts contested at all times, violated petitioners' constitutionally protected right to due process in terms meant by the Fifth Amendment to the U.S. Constitution?

3. Have the federal courts below, by their acts contested at all times, violated petitioners' constitutionally protected right to redress in terms meant by the First Amendment to the U.S. Constitution?

4. Have the federal courts below, by their acts contested at all times, violated petitioners' constitutionally protected right to a civil jury trial in terms meant by the Seventh Amendment to the U.S. Constitution?

5. Have the federal courts below, by their acts contested at all times, violated petitioners' constitutionally protected rights as to their individual sovereignty, personal security, and protections availed to them under the common law and under the laws of their state of residence, by abuses of power in terms meant to be prohibited by the Tenth Amendment of the U.S. Constitution?

PARTIES AND RESPECTIVE CAPACITIES

Charles G. Milden and Susan P. Milden, petitioners, are voluntary Chapter 11 debtors, and involuntary and disputed Chapter 7 debtors.

James J. Joseph, Chapter 7 trustee, is the disputed and contested representative of the Milden estate.

State of the Art, Inc., is a contested creditor to the Milden estate, who has agreed to pay the estate $100,000.00
David S. Samuels, George Riviere and David W. Hanna, are (or were) Officers of State Of The Art, Inc.

Robertson, Stephens & Co., is one of the corporate entities involved in the pending stock fraud issues in state court and has agreed to pay the estate $10,000.00

TA Associates, is one of the entities involved in the pending stock fraud issues in state court.

Frank A. Barcott,
Barcott Security and Investigations, is an entity that harassed, stalked, spied upon, and issued slanderous comments against petitioners under the color of law. Barcott Security and Investigations has agreed to pay the estate $25,000.00

Walter Dellinger, Solicitor General of the United States
United States of America, Office of the United States Trustee

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Petitioners, Charles G. Milden and Susan P. Milden, real persons, pray that a writ of certiorari be issued to review the judgment of the U.S. Court of Appeals for the Ninth Circuit filed in the above entitled proceeding on April 16, 1997, and Order entered rejecting petition for rehearing on June 12, 1997.

OPINIONS BELOW

The opinion and mandate of the United States Court of Appeals for the Ninth Circuit, Docket Nos.: 94-56151 and 94-56503 (Consolidated), entered April 16, 1997, and an Order rejecting petitioners' petition for rehearing and suggestion for rehearing *en banc*, are unreported and are reproduced herein (App. 1-13, and 15). A review of that opinion is sought pursuant to Supreme Court Rule 10. Jurisdiction of the U.S. Court of Appeals was obtained pursuant to 28 U.S.C. §158, and 28 U.S.C. §1291

The Rulings and Judgments of the U.S. District Court for the Central District of California, Docket Nos.: CV-93-00597-GLT, CV-93-00616, CV-93-01122-GLT, CV-94-00456-GLT, CV-94-00457-GLT (Consolidated on appeal to the Ninth Cir.), are unreported and are not reproduced herein. Jurisdiction of the U.S. District Court for the Central District of California was obtained pursuant to 28 U.S.C. §158, and 28 U.S.C. §1331 (Issues arising under the Constitution and laws of the United States).

The Rulings and Judgments of the U.S. Bankruptcy Court for the Central District of California, at Santa Ana, appealed from to the U.S. District Court for the Central District of California are unreported and are not reproduced herein. Jurisdiction of the U.S. Bankruptcy Court for the Central District of California, over issues appealed from is disputed and comprise the issues upon this appeal.

JURISDICTION OF SUPREME COURT

The opinion of the U.S. Court of Appeals for the Ninth Circuit, was filed and judgment was entered April 16, 1997. Order denying rehearing entered on June 12, 1997.

This Petition for Writ of Certiorari has been filed within ninety days of that last date, June 12, 1997. Upon that last Order this Court's discretionary jurisdiction is invoked, pursuant to **28 U.S.C. §1254(1)**.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. III, sec. 2, cl. 1:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and ... -- to controversies to which the United States shall be a party; ...between citizens of different states..."

U.S. Const. Amend. I, cl. 2 and 3 (conjunctively):

"Congress shall make no law ... abridging the freedom of speech ... ; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S. Const. Amend. 5, cl. 4:

"No person ... shall be ... deprived of ... liberty, or property, without due process of law;"

U.S. Const. Amend 5, cl 5:

"nor shall private property be taken for public use, without just compensation."

U.S. Const. Amend 7, cl 1:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,"

U.S. Const. Amend. 7, cl. 2:

"and no fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law."

U.S. Const. Amend. 10:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

28 U.S.C. §1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. §1334:

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11, but not arising under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding ... "

I.
STATEMENT OF THE CASE

The issues brought to the United States Supreme Court here seek clarification and enforcement of certain procedural and substantive matters contested by opposing parties, a bankruptcy court, a U.S. district court, and the U.S. Court of Appeals for the Ninth Circuit. Specifically, the case herewith challenges the interpretation of the Ninth Circuit courts that the U.S. Congress is granted authority under any provision of Article I of the U.S. Constitution to draft a law or to authorize a rule of procedure that may be used by third parties to encumber or abridge the substantive rights of a solvent debtor in possession of good conduct seeking re-organization under Chapter 11 of title 11, over his objections.

At issue are six orders entered by the bankruptcy court under whose authority the title 11 case below had proceeded. These six orders are as follows:

1) An order converting the petitioners' voluntarily filed Chapter 11 reorganization proceeding to an involuntary Chapter 7 liquidation case;

2) an order approving a compromise and settlement of a case proceeding in California state court by an alleged Chapter 7 trustee;

3) an order granting a motion by the alleged Chapter 7 trustee for turnover of documents;

4) an order granting a motion by the alleged Chapter 7 trustee for use of assets of the bankruptcy estate out of the ordinary course of business;

5) an order approving the compromise and settlement by the alleged trustee of tort litigation pending in state court between petitioners and parties not creditors to the estate created by the petitioners' Chapter 11 filing;

6) an order denying debtors' claimed exemptions in all proceeds and claims involved in litigation pending in state court. These exemptions relate to personal injury tort causes in action. The

> exemptions do not relate to any chattel or contract issues over which Article I of the U.S. Constitution may grant a power to the U.S. Congress to authorize a U.S. court (or its officers or appointees) to subvert individual non-contract rights because these rights are long recognized sacred to the individual in the common law. These individual rights existed prior to the ratification of our own U.S. Constitution, and are protected there in our Bill of Rights.

The particular substantive rights at issue include, but are not limited to: One's common law right to Life; one's common law right to Liberty; and one's common law right to property (as may remain after alteration by contract), all of which are protected by the due process provisions of the Fifth Amendment to the U.S. Constitution. Additionally, the Milden's right to redress (First Amendment) and right to civil jury trial (Seventh Amendment) that are stated to be "inviolate" (Rule 38 F.R.Civ.P.), have been denied to them under a Ninth Circuit citing In re A&C Properties, 754 F.2d 1377 1380-81, (9th Cir.), cert. denied, 479 U.S. 854 (1986)

> *"... [t]he law favors compromise and not litigation for its own sake, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed."* (See Appendix Page 8, Note 1)

But, as shown in the text below, the "litigation" was pending in a state court. The federal bankruptcy judge was unquestionably without any jurisdiction to "amply consider" any aspect of the case, and was by his position as a *federal* judge, incompetent to function in the capacity of a *state* judge. As a matter of due process, one has a constitutional protection for his right to insist his "judge" is one sworn to allegiance to the Constitution and Laws under which the issues arise. Bankruptcy judges upon objection are thereby legally incompetent by law to venture any opinion upon cases where the issues arise under state law -- they are sworn to

serve a different and separate 'master', whose interests may be in conflict with the sovereignty of the state.

The procedural rights at issue include, but are not limited to: One's common law right to a jury trial in a competent forum of first impression; one's common law right to be heard at any proceeding involving the party, and in expression of objections to the operation of the courts of the United States; one's common law right to call upon the protections and immunities enumerated in statutes and stated directly within the U.S. Constitution, and the constitution and laws of one's state, as may appertain to the circumstances at bar during proceedings in a U.S. court.

This instant petition presents the argument that these substantive and procedural elements of fundamental law have not been met in the proceedings below, and that this failure constitutes a warrant to the U.S. Supreme Court to view the evidence of these circumstances as described in the argument below. This petition describes certain systemic problems that have prevented these Appellants from their enjoyment of the benefits and protections of the law.

The protection of law is here sought upon grounds of Appellants' allegiance to the law. This ancient doctrine of our common law, well established in the annals of English and American jurisprudence is clear that 'he who serves in allegiance to the [Law] is entitled to its protection.

The manipulations of the plain meaning and wording of the bankruptcy code in the courts below have created the great abuses described here. Anything less than complete protection of the common law to secure the individual rights of the appellants upon their issues presented, is not law and may not be described as such.

This case involves false claims and fraudulent manipulations in a case proceeding under title 11 by persons other than the debtors, and by means of collusion between entities who are not creditors of the estate.

The facts comprising the issues in this petition are undisputed below, and are set forth in Appellant's Brief on Appeal to the US Court of Appeals for the Ninth Circuit. (See Appendix pp. 46-55)

The argument presented in petitioner's brief (App. pp. 55-74) is compared point by point below to the decision (and stated logic) of the Ninth Circuit. What is shown is that the Ninth Circuit assertions are illogical, directly conflicting with ancient doctrines of common law, and disrespective of the separation of powers that are unique to our governmental structure known as 'Our Federalism'. (App. pp. 94-101)

Petitioners challenge upon constitutional grounds relating to the conflict in allegiances by oath of office; whether a federal judge may *ever* enter an opinion adverse to the constitution and laws of a state under which issues in dispute arise during a time when his federal jurisdiction is disputed by an aggrieved party. The issue is properly raised here, since all manner of accord must be, and has been, given to the officers of the U.S. Court of Appeals for the Ninth Circuit as men "learned in the law" who understand the distinctions of Our Federalism separating the powers of governments in America, that were raised in petitioner's papers before the Ninth Circuit. (See Appendix pp. 94-101).

In papers timely filed with the Ninth Circuit there were distinctions made by petitioners relating to prior Ninth Circuit holdings affecting the powers of a bankruptcy court. (See Appendix pp. 106-111) The distinctions set forth in the Ninth Circuit's own precedents had also been addressed by petitioners' timely submitted papers. But, all this diligent work was utterly ignored by the Ninth Circuit within its decision brought here.

Petitioners are thus compelled to believe that the lower courts are attempting to secure power to their office that is, and has always been, forbidden to them. In so doing, petitioners believe that the lower courts have deprived them of their Constitutional protections.

II.
ARGUMENT

A. THE FEDERAL COURTS BELOW LACKED ANY DISCRETIONARY, STATUTORY, OR CONSTITUTIONAL AUTHORITY TO CONVERT PETITIONERS' CASE. (See App. Pages 55-69, and contested holdings at 5)

On or about October 8, 1992, the bankruptcy court, within which petitioners' Chapter 11 case was pending, issued an order converting petitioners' case from one voluntarily proceeding under Chapter 11 into a Chapter 7 liquidation case over the objections of the petitioners.

The order of conversion was unlawful in this case for the following reasons:

1) There was no showing of insolvency of petitioners' estate.

2) There was no showing of fraud or incompetence on the part of petitioners.

3) There was already pending a hearing on petitioners' plan for reorganization, where petitioners planned to pay all their creditors 100%. By some unknown means, the U.S. Trustee managed to secure a hearing on a motion to 'dismiss or convert' on a date two weeks prior to the already scheduled confirmation hearing, thus constructively negating the work of the petitioners as debtor in possession by manipulation of court calendar events, and obtaining the "conversion" prior to the scheduled hearing on the plan.

4) Although it is long established that the U.S. Congress has power to impair the obligation of contracts, even though the States may not do so (and thus this power is used frequently in bankruptcy cases), it is equally long established that the U.S. Congress is prohibited from impairing an individual's rights to property that may reasonably exist in excess of contractual obligations.

5) Neither the Article I bankruptcy courts (or judges, or appointees), nor the Article III district courts (or judges), nor the Executive Branch in the personage of a U.S. Trustee, obtain any federal authority from our U.S. Constitution to

impair an individual's Life, Liberty, or Property (in excess of that required to meet any bone fide obligations) over the individual's objections.

The bankruptcy court, the district court, and the U.S. Court of Appeals for the Ninth Circuit, all in turn have completely ignored the petitioners' argument and point of law that there was never any authority to convert the case from the original voluntary petition for relief and reorganization to a liquidation case. The focus of the three courts has been upon an alleged "failure" to "... timely file a notice of appeal" of the conversion order. (See App. pp. 5) That focus is moot under petitioners' argument to the federal courts of the Ninth Circuit that jurisdiction was never obtained by the bankruptcy court over property of the estate, since the requirements of 11 U.S.C. §303 for an involuntary conversion had never been met. (See App. pp. 60-69)

The continued assertion of "failure" to "...timely file a notice of appeal" of the conversion order has been made by the courts below in order to sidestep the petitioners' premise in argument that there was never any authority lawfully granted to the U.S. Congress under Article I, to the federal courts under Article III, and certainly not to the Executive Branch under Article II, to impair by means of a "conversion" the rights of Life, Liberty, and Property, of a solvent debtor seeking statutory temporary relief from its obligations until it could reorganize its affairs under Chapter 11 of title 11.

Instead of acknowledging that the statutory requirements of 11 U.S.C. §303 had not been met, the Ninth Circuit Court went on to state:

> *"The Mildens point to nothing in the record evidencing the filing of a timely notice of appeal from the conversion order, even following the denial of their motion for reconsideration. The district court affirmed the conversion order on jurisdictional grounds, noting that the Mildens filed no timely notice of appeal. Absent the filing of a timely notice of appeal, we also lack jurisdiction to*

consider the merits of the Mildens' objections to that order." (See App. Page 5)

The above statement simply flies in the face of the Rules of civil procedure, and the holdings of this Court since its earliest days. Notwithstanding the petitioners' substantial arguments spanning eleven and a half pages of their twenty-seven page Brief on Appeal (See App. 55-69), that set forth the authority in our law that provides a harmed party post appeal period relief from an order, the rationale asserted in the last sentence of the Ninth Circuit's opinion is insupportable under any understanding of our federalism, and our laws.

Of all the statements issued by this Court since its beginning, one message has been made consistently clear. That message is:

> *"[f]ederal courts are courts of limited jurisdiction. ... As I have written before, the federal judiciary can continue to perform its vital function in our governmental structure only if it recognizes the limitations on its own legitimate authority. United States v. New York Telephone Co., 434 U.S. 159, 178 (Stevens, J., dissenting in part)."* (Emphasis added) See: Edgar v. Mite Corp., 457 U.S. 624, 653, Stevens, J. (1982).

The argument that the Ninth Circuit Court of Appeals lacks "jurisdiction" to review the jurisdictional issue raised against its lower Article I court is absolutely and conspicuously ludicrous.

If jurisdiction, per se, is the duty of the court to determine - not the litigant to assert, then it is (because it must be) an act by the judge that stands independent of the issues pending in any case at hand. That act may be made in error. Since the bankruptcy court is an inferior court under Article I of our Constitution, any jurisdictional challenge is necessarily raised for first impression determination at an Article III court because the issue to be determined is

'jurisdictional' and therefore an issue "arising under [the] Constitution", and by instruction from Art III, Sec 2, (issues arising under the Constitution and Laws of the United States) must be first decided by the Article III court of first impression -- the district court, pursuant to 28 U.S.C. §1331.

The issue of wrongful conversion was timely raised to the district court upon petitioners' claim for relief from the order, pursuant to Rule 60(b)(4), F.R.Civ.P., voidness by reason of absence of federal jurisdiction, and Rule 60(b)(2), F.R.Civ.P., newly discovered (to the court and de facto admission by the parties) evidence that supported petitioners' claim of solvency (thereby showing lack of jurisdiction). The vehicle used for petitioners' Rule 60(b) arguments was their timely filed Appeal upon the other orders contested, although the matter had been raised before the district court under Rule 9024, F.R.Bktcy.P, and Rule 60(b).

Contrary to the statement by the U.S. Court of Appeals for the Ninth Circuit, the issue of a bankruptcy court's jurisdiction attacked under authority of a procedural rule within a timely filed appeal of a related and dependent order, is absolutely within the *original* and *exclusive* jurisdiction of the Article III district court of first impression, pursuant to 28 U.S.C. §1331, and *its* court of appeal, and is certainly timely raised if timeliness is obtained under the rule (which it was). For this reason, the Ninth Circuit holding is wrong, and the district court's holding is wrong, and the Ninth Circuit court's holding under its 1986 decision in United States v. Souza, 795 F.2d 855, at 857, is completely off base. (See App. pp. 5)

The arbitrary reliance upon Souza as absolute law is likewise flawed. This Court has made quite clear that:

> *"[d]octrines* ... [arising from precedent] *must be placed in their historical setting. They cannot be wrenched from it and mechanically transplanted into an alien, unrelated context without suffering mutilation or distortion."*
>
> *"This attitude toward precedent underlies the whole system of our case law. It was thus*

> *summarized by Mr. Justice Brandeis: 'It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen."* (cit. omitted) Reid v. Covert, 354 U.S. 49 at 50, 51

The district court and the appellate court should each have studied the issue presented to them instead of looking for some peg to hang a contrived rationale to procedurally avoid their judicial duty. But, they did not. It is now up to *this* Court in last resort to end this nightmarish event that has openly and conspicuously violated your petitioners' right to their redress, as well as their property, without any apparent regard for due process.

On point to the issue of due process at hand is this Court's own declaration in Ex Parte Bollman, 4 Cranch 75, at 93 (1807), where it is clearly explained that:

> *"As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States."*
>
> *"Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."*

Before any Article I bankruptcy court may presume to possess an actual dispositive authority over private property (whether property of an estate in a case proceeding under title 11, or not) involved in a Chapter 11 voluntary reorganization case, it must first determine that there is insufficient property in possession of the debtor to meet its contractual obligations (thus invoking its powers regulating the allotment of what

assets do exist, pursuant to its grant of powers by Congress that ~~are obtained~~ under ~~Article I, Sec.~~ 8, ~~Cl. 4,~~ "Bankruptcies").

Solvent debtors who voluntarily seek assistance from the bankruptcy court by means of a temporary impairment of contracts (such as Chapter 11) in order to completely pay all their creditors cannot be arbitrarily subjected to the federal written powers of liquidation due to "bankruptcy" over their objections. Chapter 11 "debtors" were never regarded as "bankrupt" by Congress, and the slander in those terms that the petitioners have endured from the bench of the U.S. Court of Appeals for the Ninth Circuit, and the courts below, is inexcusable. Furthermore, to affirm such a conversion and liquidation is an arbitrary exercise of power over private property regulated by the common law that is not found to have been granted to the federal government within any provision of the U.S. Constitution.

Indeed, it was so clearly in congressional respect of this fundamental differentiation between persons who were "bankrupt" and yielding their property title to an estate in the name of a court appointed trustee (as representative of the estate, ref.: 11 U.S.C. §323), and the congressionally created circumstance of persons who were not "bankrupt" and retained title to their property as an acknowledged "vested" condition (Ref.: 11 U.S.C. §1141(b). This is why a Chapter 11 debtor is referred to in the law as "debtor in possession. The "debtor" is "in possession" of his title to property and the property itself.

The law is drafted in this manner because the United States Congress has absolutely no power granted to it by any provision of Article I of the U.S. Constitution to divest any person of their pre-petition vested property rights. To do so would be a "Taking" under the Fifth Amendment of the U.S. Constitution. The Congress may withdraw its contract impairment benefit from the debtor (under conditions prescribed in 11 U.S.C. §1112(b)) for "cause", but here there has been no "cause" in terms meant ever shown. In fact, the only issues even remotely related to a "cause" were embroiled in the litigation pending in state court that the

federal judges of the federal court felt so compelled should not be given their airing at a trial.

Additionally, Congress *has* established a reasonable criteria for involuntary imposition of Chapter 7 liquidation in 11 U.S.C. §303. None of the conditions of involuntary imposition of Chapter 7 process were met, nor could they have been. The use of other authority in an obvious end run around the clear provisions of 11 U.S.C. §303 is the means by which the system has been compromised here, to do something never intended by Congress when it drafted the law. Congress seems to have foreseen the possibility for abuse of 11 U.S.C. §1121(b) when it drafted the limiting provisions of 11 U.S.C. §1112(f), *"... a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."*

As stated, petitioners did *not* claim to be "bankrupt"; did *not* seek 'protection' from their creditors under Chapter 7 liquidation; could *not* have been involuntarily subjected to Chapter 7 liquidation, pursuant to 11 U.S.C. §303; and at all times mentioned here have claimed their rights in all their property, their liberty, and their right to respect toward their persons, in order that they might fully meet all their obligations. This Court has made clear the point that a citizen can never be presumed to have waived any right protected under our Constitution without fully informed notice that such right was in jeopardy of being lost. (See: Miranda v. Arizona, 384 U.S. 436 (1986); See also, Appendix page 110)

Petitioners came to bankruptcy court in order to voluntarily seek the *temporary* federal contract impairments offered to needful persons by Congress under Chapter 11 of title 11. Under no circumstance did they seek, nor were they informed at any time that they were at risk of losing their natural rights granted to their persons "by their creator", to hold and defend their Life, Liberty, and property, by unwanted operation of Chapter 7 of title 11. Any act by any federal court to the contrary of petitioners will and right to use their assets to their own determined best use, is an act perpetrated in excess of any lawful federal authority, and

violates the due process clause of the Fifth Amendment to the U.S. Constitution.

That which may have been done upon a usurped authority, is herewith requested to be un-done upon just authority. An order entered against the will of a citizen without proper notice and jurisdiction over his person or property is void, and does not ripen into validity with the passage of time -- whether an interim appeal was filed, or not.

B. Bankruptcy Court Approval of the Chapter 7 Trustee's Settlement of Tort Litigation Pending in State Court. (See App. Pages 69-71, and the contested holding at 5-7)

Whoever wrote the Ninth Circuit decision that is the subject of this appeal has misstated both the issues brought to it on appeal, and the character of the action pending in the state court. Once again the author of the decision has replaced clear duty of its court imposed by specific elements of the U.S. Constitution with dicta derived from a plethora of circuit court decisions that cannot stand as law.

Petitioners were parties to litigation pending in state court that was originally brought there by a fraudulent claimant to the Chapter 11 proceeding below. As time and discovery unfolded, petitioners discovered that a shareholder fraud had been perpetrated against them and against the public during their opponent's Initial Public Offering. The litigation in state court did not have any contract issues. It was strictly a multiple tort case. After the trustee met with the petitioners' adversaries, a deal was struck between them and the trustee.

The deal was to pay the trustee a tidy amount of money to "settle" the case. The trustee and his attorney would walk away with their pockets full; the petitioners' adversary would escape culpability (and possible criminal prosecution) for the fraud; and, the petitioners would be expected to swallow a line of judicial dicta that claims to overcome the "inviolate" right of a demanded jury trial, and redress under the laws of one's state. It is an insider's game

that petitioners learned too late has been a continued scandal in the history of court administration.

The Ninth Circuit ignored the fact that the issues in that case arose under non-bankruptcy law, and were issues forbidden by statute (28 U.S.C. §157(b)(5), personal injury tort) to be opined upon by an Article I bankruptcy judge, and were further issues then pending in state court, where a jury demand had been asserted (the case had not been removed to federal jurisdiction by any party).

Undaunted by these facts, the Ninth Circuit laid down a litany of case law that it asserts has converted the nature of the strictly private tort issues pending in state court to *"business tort litigation"*. That because monetary remedy is involved, the Ninth Circuit has joined with several other circuits to conclude that *"... all pre-petition causes of action become property of the estate without regard to state law."*, citing Sierra Switchboard Co., 759 F.2d 709, et cetera. And, that

> *"[M]atters concerning the administration of the estate"* and *"other proceedings affecting the liquidation of the assets of the estate"* constitute *"core proceedings" under "28 U.S.C. §157(b)2(A) and (O), which are properly heard by the United States Bankruptcy Court under §157(b)(1)."* (See App. Pages 6-7)

Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) in response to this Court's *Marathon* (Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. 50 (1982), supra) holding that the 1978 plenary grant of power to Article I bankruptcy courts was unconstitutionally broad. Today, the federal courts of the Ninth Circuit declare that an Article I bankruptcy court's "original and exclusive" ("core") jurisdiction extends to issues still pending in a state court! No, it does not. Just as in Marathon this Court found that Congress had delegated more power to an Article I bankruptcy judge than was granted to the U.S. Supreme Court under Article III of our

Constitution, and that such powers were never bestowed upon Congress under Article I of our Constitution; so it is that any presumption of powers to make incursion of those rights and powers protected under the First, Fifth, Seventh, Ninth, Tenth, and Fourteenth, Amendments to the Constitution, are equally and even more importantly unconstitutional. In fact, they are powers that are deprived of congress under the First, Fourth, Fifth, Seventh, and Tenth Amendments, as discussed here.

The plight of ignorant citizens is severe who beckon to the call of Congress to "Come on down" to their neighborhood bankruptcy court and "voluntarily petition for Chapter 11 reorganization to delay their most pressing obligations in order to pay-off all of their creditors and then be dismissed without becoming "bankrupt", then to find themselves labeled "bankrupt" by the court who overtly and conspicuously approves and commits acts that destroy all value of the assets belonging to the debtor.

The courts of the Ninth Circuit presume themselves to have a federal custodial possession of a Chapter 11 debtor's property -- by law they do not. The courts of the Ninth Circuit presume themselves to have inherent dispositive powers over a Chapter 11 debtor's personal and professional reputation, choice of lawful actions, and conservation and allocation of property in meeting obligations -- they do not. If a bankruptcy court determines that a Chapter 11 debtor is abusive of the process that Congress has created, it may order a dismissal of the 'protection' that the debtor sought -- the bankruptcy judge may not exercise any of his official power to destroy the debtor, because none exists in his commission to office.

Please examine Appendix Page 5, where the Ninth Circuit states: *"Upon filing a petition for bankruptcy ..."* Bankruptcy? No such "filing" ever happened. There <u>was</u> a petition for relief under Chapter 11 filed, but petitioners have never filed a petition for bankruptcy!

The Ninth Circuit continues: *"... all of the debtor's assets, including any interest in a cause of action, pass to the trustee in bankruptcy."* Not unless the "trustee" is the

debtor, as "debtor in possession". For another entity to lawfully take title to property belonging to a solvent debtor, there must be a grant of authority from the holder of title (here there was none), or a provision of an act of congress that comports with the limiting provisions of the U.S. Constitution, that grants such an assumption of title (there is no Act of Congress which arbitrarily grants the right of title to property to any entity apart from a Chapter 11 debtor). The federal courts of the Ninth Circuit do not possess any such inherent power. An act of seizure which is committed upon a usurped power is a theft.

Justice Brandeis stated in his dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928):

> *"...In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously..."*

Justice Brandeis went on to say:

> *"...Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law;..."*

Petitioners have observed a prevailing attitude by those connected with the bankruptcy system that "assets of the estate" are actually 'assets of the insiders' within the bankruptcy system. This attitude, reinforced from the top of the federal courts downward, is underscored by the bankruptcy judge on this case who, when responding to petitioners' reminder that his opinions on the merits of the state court litigation were out of order, and particularly so in view of their jury demand in the state court, declared to the petitioners (as debtors):

> *"...If we had to try by jury all the rights that a debtor might have with respect to individuals, we wouldn't get through one-tenth of the cases that we have to deal with ...If you think that the Bankruptcy*

> *judges of this district can take the time to try claims the debtors might have against entities by jury, it just wouldn't work. So Congress knew that and set it up this way. And the courts, the Supreme Court on down, have enforced that. So your Constitutional right to a jury trial was waived when you came into this Bankruptcy Court." (emphasis added)* (See App. pp. 115-116)

To all the federal judges of the Ninth Circuit, to the Justices of this Court, the petitioners claim and declare their common law right to Life, Liberty, and Property. They assert their right to a jury trial, and to redress under the law of their State of residence which as shown above the courts of the Ninth Circuit have chosen to abandon. If constitutional provisions are suspended in bankruptcy courts, then these petitioners were enticed into a fraud by the U.S. government, and demand reinstatement to their status prior to filing their "voluntary" Chapter 11 petition. 'Voluntary in -- voluntary out'!

C. Turnover of Documents Pursuant to 11 U.S.C. §521. (See App. Pages 71-72, and the contested holding at 7-8)

After the alleged conversion of petitioners' Chapter 11 reorganization case to a Chapter 7 liquidation case, and after the petitioners' adversary from the state court litigation had made outlandish and utterly false allegations against petitioner Charles Milden, the alleged trustee entered into a compromise with the petitioners' adversary. The alleged trustee then motioned the bankruptcy court to approve the compromise which, in part required Mr. Milden to turnover all property in his possession (initially including "contents of his head" -- referring to his knowledge of software). This outlandish behavior by the court appointed trustee and the federal courts in general, mindful of the disregard and disrespect for the private rights of citizens of the United States, was alleged by the Ninth Circuit to be in order on

account of the petitioners' "voluntary submission to bankruptcy court jurisdiction" (See Appendix Page 7).

The response of the petitioners to the bankruptcy court is "keep your precious discharge, keep your precious 'protections', and dismiss the Chapter 11 case without conversion." In a nutshell, the ruse of Chapter 11 is not worth the invasion of privacy, nor the arrogant destruction of a private citizen's property.

D. Trustee's Use of Assets of the Bankruptcy Estate Out of the Ordinary Course of Business Pursuant to 11 U.S.C. §363(b). (See App. Pages 72-73, and the contested holding at 8-10).

As Chapter 11 debtors under title 11, the petitioners retained title to 100% of the outstanding shares of a California corporation named In Communications, Inc. ("ICI") As a corporation, ICI enjoys all the rights and powers of a person within the restraints of its founding charter. As such, it must be noted that ICI was not a party to the petitioners' bankruptcy case.

The petitioners had owned all the "issued" shares (2000 shares). But, ICI's founding papers from several years prior to the petitioners' filing for relief under Chapter 11 had authorized the issuance of 1 million shares, and had instructed the "Secretary-Treasurer" and the "President" of the corporation to issue shares as they saw fit as officers of the corporation. Those founding papers further prescribed the manner and means of holding shareholders' meetings and the election of officers of the corporation.

At no time did the alleged trustee, or the bankruptcy court, ever contact ICI. The officers of ICI were never summoned to the jurisdiction of the bankruptcy court. The officers of ICI were never served with any papers from the court that would cause its officers and its directors to understand that any court sought to obtain personal jurisdiction over ICI. What did happen is that the alleged trustee apparently sat down in his attorney's office, and decided to vote his shares (the 2000 shares that were inherited by the estate from the petitioners), even though the

shares were never transferred into his name, and in spite of corporate charter instructions to the contrary.

The alleged trustee elected himself "President" and "Chairman of the Board of Directors", and fired petitioner Charles Milden.

The alleged trustee drafted an agreement in support of the disputed compromise of the state court litigation.

The alleged trustee then memorialized his activity, and filed a motion to have the bankruptcy judge approve his actions "nunc pro tunc" back to the date of his declared deed.

However, absent any notice to ICI, and mindful of the original charter authority that was vested in the duly elected officers to issue up to 1 million shares of ICI stock (not the alleged trustee who made up his own rules without even becoming a registered owner of the shares), the officers of ICI determined their powers of office under the by-laws had not been disturbed, and decided to thwart the actions of the trustee upon their own authority and duty to protect the corporation assets from untoward spoliation, and sold the unissued but authorized stock (998,000 shares) to a third party. The trustee's holdings shrunk to .2% of the issued shares.

Any "Turnover Order" issued to petitioners in this regard was issued to them in their capacity as private debtors, and not in their capacity as corporate officers, since the bankruptcy court had never attempted to obtain (and therefore never obtained) "personal jurisdiction" over ICI. In their personal capacity, petitioners were (and are) not in possession of ICI's papers and do not possess authority to demand possession of them.

The alleged trustee failed to comply with the by-laws of the Corporation by failing to even announce himself in his representative capacity to the corporation, register his name as shareholder, and follow procedure relating to extraordinary shareholder elections. These failures are sufficient under ICI by-laws to defeat the alleged trustee's private election of himself to the board and as an officer. The issuance of Stock Certificate No. 3 to a third party, in the amount of 998,000 shares, and in compliance with those same by-laws, removes any power of the trustee, pursuant to

11 U.S.C. §363(b) or any federal court to interfere in the internal operation of ICI in the future.

E. Bankruptcy Court Approval of the Trustee's Settlement of the Frank A. Barcott Security and investigation Litigation, and Claimed Exemption of All Proceeds and Claims involved in Litigation Pending in State Court resulting from Personal Injury Tort Claims, Pursuant to Cal. Civ. Prac. Code §704.140. (See App. Pages 73-74, and the contested holdings at 10-13)

No aspect of this case is more illustrative of the judicial disregard for cherished provisions of our Constitution and its respect for the rights of all persons than the Ninth Circuit's holdings on Appendix Pages 10-13. The petitioners had been stalked, spied upon, personally and professionally attacked as to their character in published papers, off-duty police officers made slanderous and untrue statements to the petitioners neighbors, attorney for the alleged trustee made 'lounge-lizard' remarks recorded on an answering machine about petitioner Susan P. Milden, a phony 'psychiatric examination' was forced upon Mrs. Milden by the alleged Chapter 7 trustee appearing in the state court action and then sent out to the petitioners' creditors under a cover sheet instruction not to disclose the contents to Mrs. Milden because of possible adverse psychiatric results, and much, much more.

In discussion of the common law protections of natural rights shared by all citizens present in allegiance to the Law, Blackstone declares in his Commentaries, Part I, the common law protection of Life, at Vol. I, pp. 129, that:

> *"I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."* (emphasis added)
>
> And at 134 Blackstone continues: *"The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since,*

without these, it is impossible to have the perfect enjoyment of any other advantage or right."

That is to say, one's reputation is an attribute of "Life", as meant in the Fifth Amendment of the U.S. Constitution. It is a constitutionally protected right that is not regulated under any provision of the Bankruptcy Code.

Thus, upon this authority, petitioners proclaim that their reputations of their character, professionally and as private persons, their emotional and mental states, and their general sense of security in matters relating to their just entitlement to respect and mannerly regard, are each and every one aspects of their personal Life, as so named in the Fifth Amendment to the U.S. Constitution. These aspects of their human existence upon this Earth, and within our Nation, are not, nor have they ever been, aspects of property or any manner of chattel to be included as "property of the estate".

This very Court has stated:

> *"A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed."* Owen v. City of Independence, Mo., 445 U.S. 651, at 651 (1980).

In very stark contrast to these holdings in respect and placement of a person's reputation and government's duty to submit to the due process provisions of the Fifth Amendment protections, the Ninth Circuit has declared as follows:

> *"We have held that a debtor's pre-petition emotional distress claim is property of the estate under 11 U.S.C. §541 regardless of state law."* (citing Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F2d at 707-09, and Bronner v. Gill, 135 B.R. 645, 647 (BAP 9th Cir. 1992) *("A debtor's*

> *claim for injuries to the person, even if unliquidated at the time the petition was filed, is property of the bankruptcy estate as of the commencement of the case.")* (Foot-noting in Note 5: *"By analogy, a defamation claim would also become property of the estate under §541 and be subject to compromise by the trustee."* (See App. Pages 11-12)

The 'learned in the law' judges at the Ninth Circuit declare that aspects of a person's common law defined "Life" (as Blackstone has clearly commented upon as reported above) by the magic of their decisions in other cases become "Property", and as such are "property of the estate", pursuant to 11 U.S.C. §541. (See Appendix pp. 10-13) Petitioners respectfully suggest that the federal courts (all of them) within the Ninth Circuit actually may pose a greater threat to our Constitution, our Laws, and our Nation, than any enemy has ever presented. Anytime that those in whom Society entrusts the safekeeping of their Constitution and Laws begin to controvert their fundamental and foundational purpose for existence, there is a clear danger that Society will have nothing but a shell of a Constitution and memory of Law. Their acts constitute a gnawing away of all that our Society has sacrificed itself to build these past 220 years, and man's efforts to develop civil law since Moses brought down the tablets from Mt. Sinai.

The 9th Circuit's precedents do not hold with ancient law, this Court's own declarations of principles and its use in case determination, nor do these precedents comport with the established organized construction of laws known as torts. For example, the activity described above that was perpetrated by Barcott Security at the direction and employment of others is conspicuously that manner of offense against persons that is known as "Invasion of Privacy." This is a Tort Offense classified in Restatement of Torts, 2d, §652I, in its "Personal Character of Right of Privacy.", and there is stated:

"Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."

"Comment:"

"a. The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his." ... *and,*

"b. In the absence of statute, the action for the invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded.

...."

The Ninth Circuit courts have not explained in any of their alleged precedents how an estate in bankruptcy may become heir to a cause in action that is not sustainable by an heir to a decedent's estate. How does the Article I court obtain any manner of jurisdiction over a living man's (or woman's, or both) personal reputation, emotional well being, or right to privacy? The answer, binding on the federal government through the 5th Amendment is that the federal court does not have any such jurisdiction. Under our U.S. Constitution a person and all those things that attach to the person are not property. Congress recognized this limitation on the federal government when it drafted 28 U.S.C. §157(f) of title eleven wherein it prohibited Article I bankruptcy judges from considering issues involving "personal injury" tort.

III.
REASONS FOR GRANTING THIS WRIT

The petitioners and the Nation recoil in anger and dismay, at the conduct of our federal judges and their appointees in matters such as these. At hearings in 1991, the Honorable Jack Brooks, Chairman of the House Subcommittee on Economic and Commercial Law, studying the problem of bankruptcy fraud and abuse in the nation's bankruptcy system, expressed in his opening remarks:

> *"To the outside observer, one might begin the process with the presumption that all units of the Justice Department that have stirred up controversy in recent years, the U.S. Trustee Program would surely be at the bottom of the list. Yet this is not the case if one monitors the increasing number and intensity of complaints received by the subcommittee in recent months.*
>
> *A hint of potential scandal and abuse was intimated and earlier hearings of this subcommittee in 1987 and 1989 when we received testimony about the program becoming politicized. Apparently, this is a valid concern, among others.*
>
> *We have now received troubling reports that U.S. Trustees are not doing enough to combat fraud, including private trustee fraud, and that conflicts of interest have arisen for the U.S. Trustee in cases in which the Department of Justice or another Federal agency has an interest.*
>
> *With regard to the private trustee fraud, reports indicate that since 1987 17 former private trustees and 5 of their employees have been convicted of embezzling funds in excess of $6.1 from bankruptcy estates. Today, we expect to hear testimony from a U.S. Trustee who has uncovered millions of dollars of trustee fraud in his region. Unfortunately, I fear that these instances, like most investigations, may only be the tip of the iceberg.*

Given the increasing numbers of bankruptcy filings at a time of deep and lingering recessing, we cannot afford to take chances with the trustee system...

...I am not going to stand by while those caught up in the unfortunate economic crisis facing this country are subjected to further abuse by those entrusted with the fair administration of the bankruptcy system.

I would tell the subcommittee members--I read all the testimony last night-- and I tell you, the rule is this. If you are dead broke, go ahead and file for bankruptcy. However, if you have any property left, you had better deal with the creditors yourself, because if there is much left somebody is going to steal it, throw it away, or let it rot. The bankruptcy system will do you in like you have never been done. But if you are absolutely broke, file for bankruptcy.

But if you've got property at all, you had better fight it out yourself because the system will get you if you don't. Trustee can hire lawyers and accountants that bleed the estate. It is a wonderful deal. I don't see how the do it in good conscience. And the judges are too busy to go and watch them.

If you have any money, Craig, don't file bankruptcy because they will get it all."

House Committee on the Judiciary, Subcommittee on Economic & Commercial Law, Hearing on U.S. Trustee System, Serial Number 61, November 6, 1991

Obviously, the Chairman did not understand that federal judges, such as those on the Ninth Circuit, have made decisions that declare black to be white, wrong to be right, theft to be gift, and "Life" to be "Property".

'Cronyism', trustee fraud, insider profiteering, embezzlement, and bribery/extortion, have been identified as problems with the bankruptcy system from the beginning. The Petitioners have been subjected to the very abuses which were the subject of the Hearings of the House Subcommittee on Economic and Commercial Law in 1991.

The Court should grant this Petition because the lower courts (i.e. the bankruptcy and district courts) have strayed afar from the accepted and usual course of judicial proceedings (due process and other Constitutional protections), thereby allowing the above referenced abuses to continue. Additionally, the Ninth Circuit has sanctioned such a departure by its lower courts and calls for this Court to exercise its supervisory power.

The Court should grant this Petition because the federal courts below, as shown here, have violated the petitioners' constitutionally protected right to due process in terms meant by the Fifth Amendment to the U.S. Constitution, as determined by this Court.

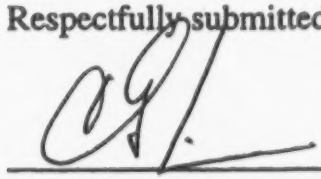
The Court should grant this Petition because the federal courts below, as shown here, have violated the petitioners' constitutionally protected right to redress in terms meant by the First Amendment to the U.S. Constitution, as determined by this Court.

The Court should grant this Petition because the federal courts below, as shown here, have violated the petitioners' constitutionally protected right to a civil jury trial over issues arising under state law that are pending in state court, in terms meant by the Seventh Amendment, as determined by this Court.

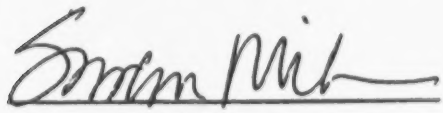
The Court should grant this Petition because the federal courts below, as shown here, have acted upon a usurped authority not granted by any provision of Article I to the Congress, nor Article III, to the Supreme Court, nor any provision of common law, as particularly determined by this Court.

DATED: August 12, 1997

Respectfully submitted,



Charles G. Milden, *in pro per*



Susan P. Milden, *in pro per*

NO:_____

In the

Supreme Court of the United States

October Term 1996

CHARLES G. MILDEN and
SUSAN P. MILDEN, debtors,
Petitioners,

vs.

JAMES J. JOSEPH, Trustee,
Respondent

A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

***

APPENDIX TO PETITION

***

CHARLES G. MILDEN, and
SUSAN P. MILDEN, both *pro se*
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CHARLES GEORGE MILDEN, and SUSAN PATRICIA MILDEN,
Debtors.

CHARLES G. MILDEN and SUSAN P. MILDEN,
Appellants,

STATE OF THE ART, INC., DAVID S. SAMUELS, GEORGE RIVIERE, and DAVID H. HANNA,
Creditor-Appellees,

JAMES J. JOSEPH, Chapter 7 Trustee,
Appellee,

ROBERTSON STEPHENS & COMPANY, and FRANK A. BARCOTT SECURITY AND INVESTIGATION,

Real-Parties-in-Interest Appellees.

In re: CHARLES GEORGE MILDEN, and SUSAN PATRICIA MILDEN,

Debtors.

FILED
April 16, 1997

D.C. No. CV-93-00597-GLT (EEx)

No. 94-56151

CHARLES G. MILDEN and SUSAN P. MILDEN, Appellants,	)	
STATE OF THE ART, INC., DAVID S. SAMUELS, GEORGE RIVIERE, and	)	No. 94-56503
DAVID H. HANNA, Creditor-Appellees, v.	)	DC. No. CV-94-00456-GLT (EE)
JAMES J. JOSEPH, Trustee, Appellee,	)	**MEMORANDUM***
FRANK A. BARCOTT SECURITY AND INVESTIGATION, Real-Party-in-Interest-Appellee.	)	

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted January 7, 1997
Pasadena, California

Before FLETCHER AND TROTT, Circuit Judges,
and JENKINS,** District Judge

Appellants Charles G. and Susan P. Milden ("the Mildens"), debtors in a Chapter 7 bankruptcy proceeding, bring this consolidated *pro se* appeal from two district court orders

affirming a series of orders entered by the bankruptcy court, including (l) an October 26, 1992

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

Honorable Bruce S. Jenkins, United States Senior, District Judge for the District of Utah, sitting by designation.

(1) Order converting the Mildens' case from a Chapter 11 reorganization proceeding into a Chapter 7 liquidation proceeding;
(2) an order approving the compromise and settlement by the Chapter 7 trustee ("Trustee") of business tort litigation pending in state court between debtors and State of the Art, Inc. ("SOTA"), TA Associates, and Robertson Stephens & Company;
(3) an order granting a motion by the Trustee for turnover of documents;
(4) an order granting a motion by the Trustee for use of assets of the bankruptcy estate out of the ordinary course of business;
(5) an order approving the compromise and settlement by the Trustee of tort litigation pending in state court between debtors and Barcott Security and Investigation; and
(6) an order denying debtors' claimed exemptions in all proceeds and claims involved in litigation pending in state court. The Mildens assert that both the bankruptcy court and the district court "exceeded their judicial powers when issuing orders" in each instance appealed from, and that the courts below acted "in excess of their federal jurisdiction." We have jurisdiction of this appeal from the district court's orders affirming orders entered by the United States Bankruptcy Court pursuant to 2S U.S.C. §§ 158(d) and 1291, and we affirm.

I

Because the issue here is whether the bankruptcy court had jurisdiction to enter the orders from which the debtors have appealed, we conduct a de *novo* review. *See* in re Vylene Industries Inc., 90 F.3d 1472, 1475 (9th Cir. 1996); In re Castlerock Prop., 781 F.2d 159, 161 (9th Cir. 1986) Otherwise, " [o]ur standard of review is the same as that of the district court. In re DAK Indus . Inc . 66 F.3 d 1091, 1094 (9th Cir.- 1995) 'Therefore, we review the bankruptcy court decision directly ' *Id.* the bankruptcy court's findings of fact are reviewed for clear error; its conclusions of law are reviewed *de novo. Id.* In re MacFarlane. 83 F. 3d 1041, 1044 (9th Cir. 1996).[*3]

The timeliness of a notice of appeal is also a question of law reviewed *de novo*. In re Saunders, 31 F.3d 767, 767 (9th Cir. 1994) (citing In re Kincaid, 917 F.2d 1162, 1164 (9th Cir.1990)).

II

A. The Mildens' Appeal from the Bankruptcy Court's Conversion Order

Rule 8002(a) of the Federal Rules of Bankruptcy Procedure requires that "[t]he notice of appeal shall be filed with the clerk within 10 days of the entry of the judgment, order, or decree appealed from. " If a party makes a timely motion to alter or amend judgment or for similar relief, "the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding." Fed. R. Bankr. P. 8002(b). The ten-day limit is jurisdictional and is strictly construed. United States v. Souza, 795 F.2d 855, 857 (9th Cir. 1986). The ten-day limit applies to appeals from orders converting a case from a Chapter 11 to a Chapter 7 proceeding and runs from the denial of a timely motion for reconsideration. *See* in re Arrowhead Estates Development Co., 42 F.3d 1306 (9th Cir. 1994).

The Mildens point to nothing in the record evidencing the filing of a timely notice of appeal from the conversion order, even following the denial of their motion for reconsideration. The district court affirmed the conversion order on jurisdictional grounds, noting that the Mildens filed no timely notice of appeal. Absent the filing of a timely notice of appeal, we also lack jurisdiction to consider the merits of the Mildens' objections to that order.

B. Bankruptcy Court Approval of the Chapter 7 Trustee's Settlement of Business Tort Litigation Pending in State Court

Upon filing a petition for bankruptcy, a debtor's legal or equitable interest in all property **[*4]** becomes property of the bankruptcy estate, subject to limited exceptions. 11 U.S.C. §541 (a)(1). "The scope of section 541 is broad, and includes

causes of action" based on events that occurred prior to the filing of a bankruptcy petition. Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707 (9th Cir. 1986). A trustee, as the representative of the bankruptcy estate, is "the proper party in interest, and the only party with standing" to prosecute causes of action belonging to the estate. In re Eisen, 31 F.3d 1447, 1451 n. 2 (9th Cir. 1994) (internal quotations omitted); *see* 11 *U.S.C.* § 323. Because the Mildens' state court lawsuit involved events that occurred before they filed for bankruptcy protection, their causes of action constituted property that belonged to the bankruptcy estate. Thus, the Trustee was the proper party to prosecute the suit, and the proper party to engage in the compromise and settlement of those claims. Because the record indicates that the Trustee did not abandon this cause of action to the Mildens, *see* 11 U.S C. § 554, the Mildens lacked standing to sue SOTA and the other defendants following commencement of their bankruptcy proceeding. Sierra Switchboard Co., 789 F.2d at 709-10 (holding that unless trustee notified creditors of his intent to abandon a claim for emotional distress, debtor lacked standing to sue because the claim remained property of the bankruptcy estate).

The Mildens' assertion that state law places their pre-petition claims beyond the reach of the Trustee fails because this court has joined the majority of circuits that have concluded that *all* pre-petition causes of action become property of the estate without regard to state law. *See* Sierra Switchboard Co., 789 F 2d at 709, Matter of Geise. 992 F.2d651, 6ss (7th Cir 1993) In re Cottrell 876 F.2d 540, 542-43 (6th Cir 1989): Tignor v. Parkinson. 72'9 F.2d 977, 9S0 (4th Cir. 1984). **[*5]**

"[M]atters concerning the administration of the estate" and "other proceedings affecting the liquidation of the assets of the estate" constitute "core proceedings" under 28 U.S.C. § 157(b)(2)(A) and (O), which are properly heard by the United States Bankruptcy Court under § 157(b)(1). The compromise and settlement of claims held by the estate are matters concerning the administration of the estate and the liquidation of estate assets. Approval of the compromise and settlement

of claims thus constitutes a "core proceeding" within bankruptcy court jurisdiction. *See generally,* In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988); *see also* W.J. Services. Inc. v Commercial State Bank of El Campo, 990 F.2d 233, 234 (5th Cir.) ("A proceeding to determine the acceptability of agreements compromising claims of the bankruptcy estate is a core proceeding which can be finally heard and determined by the bankruptcy court subject to review by the district court. 28 U.S.C. § 157(b)(2)."), *cert. denied,* S10 U.S. 948 (1993); in re Holywell Corp., 913 F.2d 873, 881 (11th Cir. 1990).

By approving the compromise of claims that are property of the estate, the bankruptcy court is not adjudicating those claims upon their merits; it is simply authorizing the disposition of an intangible asset--a civil cause of action--in exchange for a tangible asset: cash or something roughly equivalent. "Rather than conducting a detailed evaluation of the merits of the state court action," the bankruptcy court's function is "to examine the proposed settlement to determine if it falls below the lowest point in the range of reasonableness." In re Hydronic Enterprise. Inc., 58 B.R 363, 366 (Bankr. D.R I. 1986). A bankruptcy court is afforded wide latitude in approving compromise agreements which it determines to be fair, reasonable and adequate. In re Woodson, 839 F.2d at 620.[1] **[*6]**

In this instance, the bankruptcy court exercised lawful jurisdiction in approving the Trustee's settlement of the state law claims in question, and the Mildens' jurisdictional objections are without merit.

C. Turnover of Documents Pursuant to 11 U.S.C. § 521

The Mildens contend that the property that the bankruptcy court ordered be turned over to the Trustee in its April 19, 1993 order was not property of the estate or was otherwise beyond that court's jurisdiction. The Mildens' sweeping jurisdictional challenge fails by reason of their voluntary submission to bankruptcy court jurisdiction. *See* Wilson v. Bill Barry Enterprises. Inc., 822 F.2d 859, 861 (9th

Cir. 1987). 11 U.S.C. § 521 provides in pertinent part: "The debtor shall- . . . (4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, . . ." *See also* 11 U.S.C. § 542.

The bankruptcy court exercised lawful jurisdiction in entering the turnover order in question, and we affirm that order.[1] **[*7]**

D. Trustee's Use of Assets of the Bankruptcy Estate Out of the Ordinary Course of Business Pursuant to 11 U.S.C. § 363(b)

As of the commencement of their case, the Mildens owned 2000 shares, or 100%, of the stock of In Communications, Inc., a corporation. The stock ownership interest in a corporation wholly owned by the debtors becomes property of the estate upon commencement of the case. *See* In re Baker, 68 B.R. 360, 363 (D. Or. 1986); United States v. Ken Int'l. Ltd., 184 B.R. 102, 107 (D. Nev. 1995); In re Deak & Co, 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986) (under § 541(a), shares of stock controlled by debtor are property of the estate); In re MacDonald. 114 B.R.326, 333-34 (D. Mass. 1990) (property of the estate includes stock in which debtor owned equitable interest); 11 U.S.C. § 541(a)(1) ("all legal or equitable interest of the debtor in property as of

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[1] In turn, a "bankruptcy court's order approving the trustee's application to compromise [a] controversy is reviewed for abuse of discretion.'. In re A & C Properties, 784 F.2d 1377, 1380 (9th Cir.), *cert. denied*, 479 U.S. 854 (1986) "The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims." *Id* at 1380-81. Accordingly, "[t]he law favors compromise and not litigation for its own sake, and as long as the bankruptcy court amply considered the various factors that determined The reasonableness of the compromise, the court s decision must be affirmed " *Id*. at 1381 (citations omitted) (emphasis added).

commencement of the case" becomes property of the estate.)[2] Once appointed, the Trustee acted as representative of the estate pursuant to 11 U.S.C. § 323(a), with the power and duty to manage all of the assets of the estate, including the stock, books and records in a wholly-owned corporation. In re Baker, 68 BR at 363-64. 11 U.S.C. § 363(b)(1) provides that "[t]he trustee, after notice and a hearing, may use sell, or lease, other than in the ordinary course of business, property of the estate."

As part of the settlement of the estate's claims against the SOTA defendants that was approved by the bankruptcy court in its May 19, 1993 order, the SOTA defendants sought a release by in Communications, inc. of any claims it may have had against them. Accordingly, the Trustee sought and obtained bankruptcy court approval to use property of [*8] the estate, viz., the shares of stock in In Communications, inc., in order to obtain the execution of the requested release.

The Mildens assert that In Communications, Inc. was not a debtor and was not otherwise summoned to appear in their bankruptcy case, and therefore, was not part of the bankruptcy estate and was beyond the jurisdiction of the bankruptcy court. The bankruptcy court thus could not authorize the Trustee to vote the In Communications, Inc. shares in order to execute a release of its claims.[3]

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2 The Mildens conceded as much before the district court in their Reply to Appellees' Briefs filed below, the Mildens state: "Charles and Susan Milden, as individuals, were and are still, the registered owners of the 2,000 shares of ICI stock that is the unarguable property of the estate.")

3 The Mildens also object on the grounds that the corporate actions taken by the Trustee violated the corporation's by-laws and California corporation laws They do not particularize their objections through reference to by-law or corporations code language. The SOTA appellees respond that the Trustee's actions were permissible, *inter alia*, under section 603 of the California Corporations Code, dealing with actions upon consent of shareholders without meeting. The Mildens offer no reply. Indeed, before the district court, the Mildens conceded that if the Trustee was lawfully appointed, he had the right to exercise all of the rights attendant to the ownership of the

With respect to the jurisdiction of the bankruptcy court, 28 U.S.C. § 157(b)(2)(M) specifically provides that "orders approving the use or lease of property" are core proceedings over which the bankruptcy court has jurisdiction. In re Vylene industries. Inc., 90 F.3d 1472, 1475-76 (9th Cir. 1996). The bankruptcy court acted within its jurisdiction in finding that the Trustee had a proper business justification for the proposed use of the In Communications, Inc. stock.[4] It correctly approved the use of the stock pursuant to 11 U.S.C. § 363(b)to effectuate the Trustee's settlement with the state court defendants. **[*9]**[4]

E. Bankruptcy Court Approval of the Trustee's Settlement of the Frank A. Barcott Security and investigation Litigation

Prior to commencing the bankruptcy proceeding, the Mildens sued Barcott Security and Investigation ("Barcott") in Superior Court for Orange County, California, for intentional and negligent infliction of emotional distress, negligence and defamation. Following the conversion of their case to a Chapter 7 liquidation proceeding, the Trustee entered into a settlement agreement with Barcott which was approved by the

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shares--provided he had debtor Susan Milden (corporate secretary) issue stock certificates in his name.

[4] The bankruptcy court found proper business justification for the Trustee's proposed use: (1) the use would allow execution of the proposed settlement with the SOTA defendants and would help realize $100,000 for the estate; (2) the Trustee had no evidence of claims which the corporation may have against SOTA having any value; and (3) the stock as property of the estate was otherwise valueless. The bankruptcy court authorized the Trustee as majority shareholder to amend the by-laws, appoint one director (himself) and authorize that director to release the corporation's claims against SOTA, and as director to execute such a release, and then "to resign as director of in Communications, inc. and to abandon the stock of In Communications, Inc." to the Mildens.

bankruptcy court, an order subsequently affirmed by the district court.

The Mildens contend that a cause of action does not become property of the estate unless under state law "such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process ...." We have held that a debtor's pre-petition emotional distress claim is property of the bankruptcy estate under 11 U.S.C. § 541 regardless of state law. Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d at 707-09; *see also* Bronner v. Gill, 135 B.R. 645, 647 (BAP 9th Cir. 1992) ("A debtor's claim for injuries to the person, even if unliquidated at the time the petition was filed, is property of the bankruptcy estate as of the commencement of the case.") (citing Sierra Switchboard)).[5] The California state courts also acknowledge the effect of § 541 on causes of action "Upon the filing of a petition for bankruptcy all of the debtor's assets, including **[*10]** any interest in a cause of action, pass to the trustee in bankruptcy." People v. Kinys Point Corp., 188 Cal.App.3d 544, 548, 233 Cal.Rptr. 227, 229 (1986) (citations omitted). Like the claims against others discussed above, the claims against Barcott Security were property of the estate and subject to compromise and settlement by the Trustee. The bankruptcy court had jurisdiction to approve that settlement in the context of a "core proceeding" under 28 U.S.C. § 157. The Mildens' jurisdictional objection has no merit.

F. Debtors' Claimed Exemption of All Proceeds and Claims involved in Litigation Pending in State Court as "Personal Injury" Claims Pursuant to Cal. Civ. Proc. Code § 704.140

The Mildens filed their voluntary petition seeking relief pursuant to Chapter 11 of the Bankruptcy Code on October 24, 1991. On September 20, 1993, nearly a year after the

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[5] By analogy, a defamation claim would also become property of the estate under § 541 and be subject to compromise by the trustee

conversion to a Chapter 7 proceeding and appointment of the Trustee, the Mildens for the first time sought to amend their schedules to include the now-settled state tort claims as property exempt from administration under 11 U.S.C. § 522(b)(2) as "personal injury" claims within the meaning of California Civil Procedure Code § 704.140(a)-(d)[6] Allowance of exemptions is a "core proceeding" within the bankruptcy court's jurisdiction 28 U.S.C. § 157(b)(2)(B).

The bankruptcy court in In re Haaland, 89 B.R. 845 (Bankr. S.D. Cal. 1988), *aff'd in part, rev'd in part on other grounds sub nom.* Haaland v. Corporate Management Inc., 172 B.R. 74, 77 (S D.Cal. 1989)[7], construed § 704.140 as applying only in cases of **[*11]** physical injury "as a substitute for lost future earnings of the debtor which were necessary to support him and his dependents because he was disabled and could no longer fully function in the work force." 89 B.R. at 847. The district court affirmed in Haaland, concurring in the bankruptcy court's construction of § 704.140. 172 B.R. at 77.

Relying on Haaland, the bankruptcy court found that the claims against the SOTA defendants, TA Associates and Robertson Stephens involved contractual and other pecuniary losses, not "personal injury" within the meaning of § 704.140. As to the claim against Barcott Security alleging damages for emotional distress, the bankruptcy court found that there was no evidence either of a physical injury associated with the Barcott claim or that the Barcott settlement proceeds were necessary for the support of the Mildens. The district court

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[6] Section 704.140 reads in pertinent part: "(a) . . . a cause of action for personal injury is exempt without making a claim (b). . .an award of damages or a settlement arising out of personal injury is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor."

[7] The Mildens do not discuss In re Haaland; nor do they proffer reasoning or authority leading to a different construction of Calif. Civ Proc. Code § 704 140 than that adopted by the bankruptcy and district courts. No contrary Ninth Circuit authority otherwise appears Nor do they point to evidence in the record indicating that the lower courts' findings of fact were clearly erroneous either as to the nature of the injury claimed or the Mildens' apparent need.

affirmed, concluding that allowance of exemptions is defined as a "core proceeding" by 28 U.S.C. § 157(b)(2)(B), affording the bankruptcy court jurisdiction over the issue, and that consistent with Haaland, the bankruptcy court's findings that no physical injury was claimed and that the proceeds of settlement were not needed to support the Mildens were not clearly erroneous. We agree, and we therefore affirm.

CONCLUSION

The Mildens' appeal from the October 28, 1992 order converting the Mildens' case from a Chapter 11 reorganization proceeding into a Chapter 7 liquidation proceeding is untimely; that order is AFFIRMED on jurisdictional grounds. The district court's June 6 and September 20, 1994 orders affirming the bankruptcy court rulings at issue in this appeal are also AFFIRMED.

[STAMP]
A TRUE COPY CATHY A. CATTERSON
Clerk of the Court
ATTEST
June 20, 1997
Signed by Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 12 1997

CHARLES G. MILDEN and SUSAN P. MILDEN Appellants,	)	Nos. 94-56151 94-56503
v.	)	DC# CV 93-00597-GLT
JAMES J. JOSEPH, Chapter 7 Trustee Appellee.	)	CV 94-00456-GLT
	)	ORDER

Before: FLETCHER and TROTT, Circuit Judges, and JENKINS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Trott have voted to reject the suggestion for rehearing en banc and Judge Jenkins reccomends rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Bruce S. Jenkins United States Senior District Judge for the district of Utah, sitting by designation.

DISTRICT COURT CASE NUMBERS	COURT OF APPEALS CASE NUMBERS
CV-93-00597-GLT	94-56151
CV-93-00616-GLT	94-56503
CV-93-01122-GLT	CONSOLIDATED
CV-94-00456-GLT	ON APPEAL FROM
CV-94-00457-GLT	Bankruptcy Case No: SA 91-40157-JR

United States Court of Appeal

FOR THE NINTH CIRCUIT,

CHARLES G. MILDEN and
SUSAN P. MILDEN
Appellants,

vs.

JAMES J. JOSEPH, Chapter 7 Trustee,
Appellee.

An Amended Petition for Rehearing, and Suggestion of Hearing *En Banc* of Appeal from Final Rulings Issued by the U.S. District Court for the Central District of California

CHARLES G. MILDEN and
SUSAN P. MILDEN
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Appearing *In propria personae*

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Brief Format Certification Pursuant to Circuit Rule 32(e)(4)

We hereby certify that that this Petition for Rehearing is proportionaly spaces in the Times Roman font, 14 point in size and contains 4,136 words (exclusive of the Certifications, Table of Contents and Table of Authorities).

Dated: May 6, 1997

CHARLES G. MILDEN SUSAN P. MILDEN
Appearing *In propria persona*

INTRODUCTION

In the judgment of the Appellants, representing themselves in pro per, several material points of fact and law have been overlooked in the decision of this Court. Additionally, there exists an apparent conflict with decisions this Court in this instant case and cases determined in other Circuits as well as decisions of the United States Supreme Court.

The overlooked material points of fact and law as well as the apparent conflict with decisions of other Circuits and the United States Supreme Court are discussed in detail in the Procedural History and Argument Section of this Petition for Rehearing.

Respectfully submitted.

CHARLES G. MILDEN SUSAN P. MILDEN
Appearing *In propria persona*

REFERENCE TO OPINIONS BELOW

1. A District Court Order denying a collateral challenge upon the Constitutional and jurisdictional grounds of the Bankruptcy Court's authority to convert a voluntary Chapter 11 Reorganization Proceeding (of a solvent estate) to an involuntary Chapter 7 Liquidation proceeding under Title 11.

2. An Order affirming Bankruptcy's Court's grant of a Trustee's Motion to compromise a lawsuit between Debtors and a party to the underlying Bankruptcy Case, that is pending outside the jurisdiction of the District Court.

3. An Order affirming the Bankruptcy Court's grant of a Trustee's Motion to compromise a lawsuit between Debtors and third parties not connected to the underlying Bankruptcy Case, that is pending outside the jurisdiction of the District Court.

4. An Order affirming Bankruptcy Court's grant of a Trustee's Motion for Turnover of Property.

5. An Order affirming Bankruptcy Court's grant of a Trustee's Motion for Use of Property of the Estate Outside the Ordinary Course of Business.

6. An Order Affirming Bankruptcy Court's grant of a Trustee's Motion to Deny Debtor's Claimed Exemptions in all proceeds and claims involved in litigation pending in state court.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit obtains appellate jurisdiction to hear this appeal pursuant to **28 U.S.C. §1291**, and **28 U.S.C. §158**. This Court obtains jurisdiction to rehear this appeal pursuant to F.R.A.P. 40, Petition for Rehearing, FRAP 35, Determination of Causes By The Court In Banc, and Local Rules 40-1 and 35-1.

STANDARD OF REVIEW

This appeal involves issues arising directly under the U.S. Constitution and non-bankruptcy federal and state statutes, and which issues present a federal question, pursuant to **28 U.S.C. §1331**. The standard of review by this court as to the conversion issue is abuse of discretion; de novo as to all other jurisdictional questions presented, and (as may be determined) upon issues arising under federal law apart from jurisdictional challenges. Any factual issues are to be reviewed under the standard of clear error.

ISSUES CREATED BY PANEL JUDGES ON APPEAL, AND PETITIONED FROM HEREIN TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BELIEVED TO BE OF SUCH NATURE AS TO REQUIRE THE COURT TO HEAR THEM *IN BANC*

1. Has the Appellate Panel relied upon prior Ninth Circuit holdings contradicted by controlling Constitutional and federal statutory law, and Supreme Court interpretations of law, upon the circumstances of the case, and thereby warrant a reconsideration *en banc*?

2. Has the Appellate Panel made an Order (and Memorandum) that asserts an opinion of law which is contradicted by another U.S. Court of Appeals, and thereby warrant a reconsideration *en banc*?

3. Does the opinion of the Appellate Panel observe due respect for the principles of separation of powers, and supremacy of constitutional authority as set forth upon the issues presented by the U.S. Supreme Court, and thereby warrant a reconsideration *en banc*?

ISSUES ORIGINALLY PRESENTED TO APPELLATE PANEL

1. Did a bankruptcy court and the District Court commit a reversible error when they converted a case proceeding under Chapter 11 to a case proceeding under Chapter 7, if it knew that the estate involved was worth far more than all the claims by bona fide creditors against it, and the Chapter 11 debtor opposed the conversion?

2. Did a bankruptcy court and the District Court commit a reversible error when they issued an order approving a compromise of a contract, securities fraud, and personal injury tort suit that was known to the respective courts below to be pending in state court?

3. Did a bankruptcy court and the District Court commit a reversible error when they issued an order approving a compromise of a personal injury tort case that involved the debtors against a non-party to the bankruptcy proceeding, and that was known to by the respective courts below to be pending in state court?

4. Did a bankruptcy court and the District Court commit a reversible error as a matter of law when they issued an order for turnover of property belonging to a corporate entity not ever made subject to the jurisdiction of the bankruptcy court.

5 Did a bankruptcy court commit a reversible error law when it granted a trustee's motion for an order approving the use of property of the estate outside the ordinary course of business?

I. PROCEDURAL HISTORY

1. The history of this case as set forth in Appellants' Brief, pages 2 -10, and within enumerated paragraphs 1-44, are referenced here as if restated in their entirety.

2. **Procedural clarification:**

Appeal Issue No. 1, whether the "... Bankruptcy Court and the District Court" had committed a reversible error when "they" converted Appellants' voluntary Chapter 11 case to a case proceeding under Chapter 7, was very poorly worded by Appellants to this Court. In actual fact, there had never been a direct appeal of the conversion order taken from the bankruptcy court, nor had Appellants' alleged such to have been taken. The bankruptcy court's jurisdictional issue first arose by way of Appellant's Rule 60(b)(4) opposition at the time of compromise, and subsequently by way of a Rule 60(b)(4) authority expressed within the briefing papers to the orders appealed to the District Court. After the District Court failed to address the Appellants' direct challenge to any federal authority to impose a Chapter 7 liquidation over the objections of a voluntary Chapter 11 debtor (the alleged abuse of discretion), an appeal of the District Court order upon the subject was then *timely filed and taken here*.

The U.S. Court of Appeals for the Ninth Circuit Affirms the Lower Orders.

3. On or about April 16, 1997, the U.S. Court of Appeals for the Federal Circuit, through the persons of its impaneled judges, entered an Order and Memorandum affirming the appealed from Orders issued by the U.S. District Court for the Central District of California, and the U.S. Bankruptcy Court for the Central District of California.

4. This Petition is filed as permitted by the Federal Rules of Appellate Procedure, Rule 40, Petition for Rehearing. It is filed in order that Appellants may obtain consideration of their issues as presented within the actually intended context of their appeal to this Court. The principle

jurisdictional attack here is against the discretionary authority of any federal court to order the liquidation of private property over the objections of an individual who had voluntarily petitioned for federal protection under Chapter 11, *and* where involuntary commencement of a Chapter 7 proceeding would not circumstantially be permissible under 11 U.S.C. §303, *supra*.

II. ARGUMENT

1. The Appellate Panel relied upon prior Ninth Circuit holdings contradicted by controlling Constitutional and federal statutory law, and Supreme Court interpretations of law, upon the circumstances of the case, and this circumstance warrants reconsideration en banc by this Court.

Appellants (Mildens) have reviewed with care the text of the Appellate panel's Memorandum in decision of their appeal. Certain statements of fact made by the Panel are materially incorrect as to their factual content. This Court and the courts below have been preoccupied with the analysis of appellate merit review jurisdiction as set forth in United States v. Sousa, 795 F.2d 855 (9th Cir. 1986) ("Sousa").

There, a fundamental distinction between this case and Sousa that this and the lower courts have all misunderstood and have each misstated. In Sousa, the appellant sought a direct review of the merits of a decision made in his bankruptcy case. This Court (properly) determined that the District Court's consideration of the merits of his argument could not have been made, as the appeal upon the merits was untimely.

However, with regard to the Milden's issue relating to the alleged "conversion" of their case from one proceeding under Chapter 11 to a case proceeding under Chapter 7, the question to be resolved is jurisdictional, not a question upon the merits. That is to say, without a showing of insolvency, and without meeting the elements that Congress has set forth for involuntary commencement of a case, a bankruptcy court

obtains no independent authority under law to take from the debtor any pre-petition pecuniary right, nor any personal right, that was not granted by Congress under title 11, even though Congress may regulate the exercise of such rights under the bankruptcy clause of Article 1. To do so anyway, and without immediate payment of just compensation, would be to exercise an arbitrary power that is forbidden by the Fifth Amendment due process clause. "A belief that a particular result appears reasonable or wise is an insufficient predicate for the exercise of federal judicial power." See: Edgar v. Mite, Corp., 457 U.S. 624, 653 (1982).

Mildens' opposing parties in these matters, and the courts involved, have argued ad nausium that Congress had given to them the authority to "convert" their Chapter 11 case upon motion of the U.S. Trustee, pursuant to 11 U.S.C. §1112(b). In actual fact, Congress had bestowed no such sweeping power to any parties or to the court, and the Mildens have properly used Rule 60(b)(4) for that Rule's intended purpose to assert their challenge to the bankruptcy court's earlier usurpation of federal powers. (See generally Congress's limitations of authority to the bankruptcy court that is contained within 11 U.S.C. §1112(f)), to wit: "Notwithstanding any other provision of this section, a case *may not be converted* to a case under another chapter of this title unless the debtor may be a debtor under such chapter." (Emphasis added) Absent the conditions set forth in 11 U.S.C. §303, supra, a "commencement" of a Chapter 7 case (whether by a direct petition by third parties, or whether by motion for "conversion", as herein described), over the objections of the debtor, is not a permitted authority granted under written law.

In observation of the limitations imposed by statutory as well as constitutional limitations upon federal powers, the court was certainly required to observe its own (and exclusive) duty to declare its authority (jurisdiction) to "convert" the Mildens' case. The Supreme Court has made very clear that such a duty exists upon every court when it stated "[b]efore a federal court exercises any governmental power, it has a duty to determine its own jurisdiction to act. ... [T]he federal

judiciary can continue to perform its vital function in our governmental structure only if it recognizes the limitations on its own legitimate authority." See Edgar v. Mite. Corp., 457 U.S. 624, 653 (1982).

Neither the bankruptcy court, the District Court, nor the Appellate Panel, seems to have been guided by the principle that they should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative poses no constitutional question." See Gomez v. United States, 109 S.Ct. 2237, 2241 (1989).

Was there 'a reasonable alternative [posing] no constitutional question"? Absolutely there was. the moving papers themselves carried the first request of a "dismissal". It is unassailable that whatever protections extended by Congress (such as relief obtained under the automatic stay while reorganizing under Chapter 11) may be withdrawn if the congressional intent and administrative requirements have not been met by he who seeks the congressional benefit.

The use of Rule 60(b)(4) is sustainable independently, or subjectively, and it is not limited by time. The cases are legion establishing that a judgment or order that is entered without jurisdiction is void While Rule 60(b)(4) should not be used in lieu of appeal, Milden has reasonably explained to the Court his dilemma involving abandonment by his attorney at the juncture of the intended (by Milden) appeal (the attorney stating to the Mildens' utter shock, 'I don't do appeals').

As shown above, the burden was clearly upon the bankruptcy court judge to make an initial assessment of circumstances under which to entertain the act of opting to convert the Milden case, rather than to dismiss or to deny or defer decision upon the motion, pending the prior scheduled hearing upon the Mildens' Chapter 11 Plan of Reorganization.

Mildens had no duty to determine the judge's jurisdiction. Such a determination is the sole providence of the judge. The fact that the bankruptcy judge actually made no such statement of authority as would explain and justify his opting for conversion over dismissal, denial, or deferment pending the hearing upon the Mildens' plan, gives compelling reason for this Court and the District Court not punish the

Mildens for the failure of the bankruptcy court judge to perform the most fundamental of his own duties. Furthermore, no allowance may be accorded the bankruptcy court judge for unstated considerations mitigating his order of conversion, since Congress has been so explicit as to clearly limit the power in bankruptcy to make such a conversion (See again 11 U.S.C. §1112(f), and further application of the limitation imposed upon the Congress itself, as well as the federal courts, by the due process provisions of the Fifth Amendment relating to an individual's private right to life, liberty, and to property). "The principle of *due process* given expression in this amendment is a limitation on the executive, legislative, and judicial powers of the federal government." Camden County v. Pennsauken Sewerage Authority, N.J., 105 A.2d 505, 15 N.J. 456 (1954). (emphasis added)

Rule 60(b)(4) in relevant part reads: ""On motion and upon such terms as are just, the court may relieve a party .... from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void ...". Black's Law Dictionary defines the word *void* as "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. Hardison v. Gledhill, 72 Ga.App. 432, 33 S.E.2d 921, 924. Absent a judicial expression of an authority that conforms to the provisions of 11 U.S.C. §1112(f), no presumption of authority may be conferred upon any federal judge to overcome a constitutionally protected private right. No act, or failure to act, by any of the contesting parties could vest a federal court with powers that it did not obtain from the written law. As early as 1804, the Supreme Court declared "[a]s preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disdains all jurisdiction not given by the constitution, or by the laws of the United States. ... [C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Ex parte Bollman, 4 Cranch 75, 93

Accordingly, the bankruptcy court, District Court, and Appeal Panel's narrow focus upon the Mildens' inability to

make a timely appeal pursuant to Rule 8002, and the merits of such an appeal if it had been made, are moot issues. The only issue brought by the Mildens to the courts below, and to this Court was the collateral attack upon the deed of the bankruptcy judge of issuing an order converting their case without authority under written law. That issue was properly raised to the bankruptcy court within arguments against the compromise and turnover motions, and ignored. It was properly (and timely) raised within the appeal to the District Court of the compromise and turnover orders, and ignored again. That same issue (now properly appealed from the District Court to the Court of Appeals, here) was again ignored by this Court.

This Court has committed an egregious error in violation of Appellants' due process protections by turning its head from its duty to examine the lower courts' jurisdictional status. Duty requires this court to examine the jurisdictional authority of any lower court when challenged by a party coming before it -- irrespective of the merits (if any) that may have been brought upon appeal, and irrespective of whether there was even an appeal filed. The Appeals Panel statement that "[a]bsent the filing of a timely notice of appeal, we also lack jurisdiction to consider the merits of the Mildens' objections to that [conversion] order ...", is completely off point to the issues presented below and appealed from here. Clearly, this Court always has the duty to examine the jurisdictional status of its lower courts when so challenged. (See authorities presented in Appellants' Brief, pages 11-18, and footnotes 18-26; See also, authorities presented here above).

It was the burden of the moving parties to provide to the bankruptcy court such circumstances under which the bankruptcy court could entertain a motion for conversion -- they did not.

It was the profound duty of the bankruptcy court to observe the statutory limitations upon its authority to convert the Mildens' Chapter 11 case to a Chapter 7 case -- it did not.

It was the duty upon Mildens' later raising this issue to both the lower courts, and then here to this Court, for the

respective judges to look only at the jurisdictional issue that the Mildens' raised, and to throw out all the procedural consequences of the bankruptcy court's act in absence of authority -- they have not.

Wherefore, the Mildens have now come upon this Petition to obtain relief from this history of unwarranted acts conspicuously committed in spiteful disregard of any authority, and to obtain from this Court an affirmative respect for their private right to secure the benefits and protections imposed upon all three branches of government by the due process provisions of the Fifth Amendment. This Court may not deny its duty to superintend the procedures affecting the jurisdiction of its lower courts. The issue that the Mildens have repeatedly presented is procedural, not substantive.

2. The Appellant Panel has made an order and memorandum that asserts an opinion of law that is contradicted by another U.S. Court of Appeals, and thereby warrant a consideration en banc.

This Court has set forth a line of reasoning in Sierra Switchbord Co. v. Westinghouse Elec. Corp., 789 F.2d at 709, 709-10 (9th Cir. 1986), that is alleged by Mildens to be unconstitutionally narrow and obscene, and further is applied in the context of presumptions of fact by the Appeals Panel that are on point refuted by the record of the case.

Let this Court, the Appellees, and the government of the United States in all its branches and forms, take notice: The persons of Charles Milden and Susan Milden are not, nor have they ever been, chattel belonging to any estate. Their personal reputations are not chattel. Their emotional states are not chattel. Their personal standing in society is not chattel. And, just as their corporal being is not chattel, their rights protected under the United States Constitution and the California Constitution, are not chattel. This Court is graced with the presence of real human beings in possession of human lives, and its disregard of same is an immoral, contemptible, and disgusting -- if not legally actionable -- abrogation of submission to its role in society.

The Appeal Panel has declared that:

> "... the Mildens' state court lawsuit involved events that occurred before they filed for bankruptcy protection, their causes of action constituted property that belonged to the bankruptcy estate. Thus, the Trustee was the proper party to prosecute the suit, and the proper party to engage in the compromise and settlement of those claims. Because the record indicates that the Trustee did not abandon this cause of action to the Mildens, see 11 U.S.C. § 554, the Mildens lacked standing to sue SOTA and the other defendants following commencement of their bankruptcy proceeding. (citing again Sierra)

It is inconceivable to ordinary people that a high federal court would engage in such an arrogant and disingenuous clamor of alleged fact and law, but that is what the Appeal Panel has written. Now hear the truth. Trustee Joseph approached the court at one juncture within the compromise negotiations, and recommended to the bankruptcy court that he abandon all the personal injury matters to the pursuit of the Mildens because he was "unqualified" to pursue them himself. The bankruptcy judge, John Ryan, declared that he would not "allow" such abandonment, and that he would not allow the Mildens to intimidate him! My, my, my, ... aren't we touchy. How is it that assertion of truth, documents obtained constituting substantial securities fraud under federal and state laws, gross invasion of personal privacy including 30 days of actual stalking, have worked together to cause that bankruptcy judge to feel intimidated?

The answer is simple. The bankruptcy judge chose to disregard the assertions of the Mildens at the onset, unlawfully converted their voluntary Chapter 11 case to an involuntary Chapter 7 case, and then became embarrassed that the findings of the trustee he had appointed confirmed the protestations of

the debtors. Instead of immediately acting to undo the damages done to the Mildens (their home which had been their reason for seeking federal protection in the first instance had been abandoned to the mortgagee, and foreclosed upon at an immense loss of funds to the estate), the judge panicked at the thought of Mildens' potential opportunity of vindication, and ordered the trustee not to abandon the personal injury action to the Mildens.

That is what the record reflects. The record in numerous places also reflects a significant amount of court time bouncing back and forth upon the Mildens' chances of success in their lawsuit against other parties in state court, and just how many hundreds of thousands of dollars might be realized. To suggest that all this pre-trial hypothecation of the merits of the causes in action are proper proceedings in a federal court is to glean perverted comfort from the hot gasses emitted from the combustion of our Constitution and its Bill of Rights.

The Appeals Panel further alleged that a debtors personal injury tort issues become property of the estate because they constitute core proceedings" under 28 U.S.C. Sec. 157(b)(2)(A), and (O). This holding is clearly not so in general, and specifically not so in this case. Those two particular statutory grants are the "catch all" provisions of title 11, and as asserted here are used to defeat the congressional distinction between "core" and "non-core" proceedings. Obviously Congress intended that there be such a distinction, and notwithstanding this Court's collection of sister circuit authorities in support of its opinion, the Eighth Circuit took the time to look at the intent behind the law. It said:

> "We hesitate to reach too far to imply the authority for an article I court to try jury cases involving private rights simply because Congress seeks to introduce a more efficient bankruptcy scheme, SEE GRAN-FINANCIERA, 109 S. Ct. at 2801 n.17, especially where congressional and historical support for that authority is lacking." See: In

re United Missouri Bank of Kansas City, N.A., 22 C.B.C. 2d 1400

3. The Opinion of the appellate Panel fails to observe due respect for the principles of separation of powers, and supremacy of constitutional authority as set forth upon the issues presented by the U.S. Supreme Court and thereby warrant a reconsideration en banc.

The Appellants do not question that all strict pecuniary assets, all physical assets, all contracts, and all defined intellectual property, are legitimate assets of an estate. But that which relates only to the person and personage of an individual before a federal court is that which cannot be separated from that individual without doing personal harm to the individual in terms precisely meant to be prevented by the due process provisions of the Fifth Amendment.

But, this Court in its past has "concluded that all pre-petition causes of action become property of the estate without regard to state law." (citations omitted) It is just such arrogance by officers of government that our framers anticipated and sought to prevent when they crafted our federation of states. How dare the federal government approach substantive protections arising under state law, "... without regard to state law"? To even suggest that the power conveyed in all aspects of Article I to Congress as may be relevant to its Sec. 8, Cl. 4, duty "To establish ... uniform Laws on the subject of Bankruptcies throughout the United States" is such an overwhelming power that the federal courts are free to ignore the very source of many of the rights in its custody, brings fresh meaning to Madison's admonition that without the Bill of Rights, the [U.S.] Constitution is naught but a parchment barrier against tyranny.

In short, due process forbids such arrogant disregard of the source and nature of personal rights and protections as determined by the legislatures of our various states. When it happens, as here, the Tenth Amendment in conjunction with the Fifth and Fourteenth amendments are properly brought to bear against this abuse of federal authority and discretion.

This Court always has an affirmative duty to defend our Constitution, and its blind eye that has been cast to its independent duty in these matters is shameful.

DISTRICT COURT CASE NUMBERS

CV-93-00597-GLT
CV-93-00616-GLT
CV-93-01122-GLT
CV-94-00456-GLT
CV-94-00457-GLT

COURT OF APPEALS CASE NUMBERS
94-56151
94-56503
CONSOLIDATED ON APPEAL

United States Court of Appeal

FOR THE NINTH CIRCUIT,

CHARLES G. MILDEN and
SUSAN P. MILDEN
Appellants,

vs.

JAMES J. JOSEPH, Chapter 7 Trustee,
Appellee.

On Appeal from the Final Order of the United States District Court for the Central District of California Affirming the Rulings of the United States Bankruptcy Court, Central District of California

APPELLANTS' OPENING BRIEF

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CERTIFICATION OF SERVICE

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I hereby certify that an original and a true copy of Appellants' Brief on Appeal has been filed on the 7th day of February, 1995, at the U.S. District Court for the Central District of California, Santa Ana, California. One (1) copy each has been mailed by means of first class prepaid postage, on this 7th day of February, 1995, to the following persons:

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REFERENCE TO OPINIONS BELOW

AN ORDER GRANTING A TRUSTEE'S MOTION TO COMPROMISE A LAWSUIT OUTSIDE THE JURISDICTION OF THE DISTRICT COURT.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit obtains appellate jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291, and 28 U.S.C. §158.

STANDARD OF REVIEW

This appeal involves issues arising directly under the U.S. Constitution and non-bankruptcy federal and state statutes, and which issues present a federal question, pursuant to **28 U.S.C. §1331**. The standard of review by this court is abuse of discretion, as to all questions presented.

ISSUES PRESENTED

1. Did a bankruptcy court and the District Court commit a reversible error when they converted a case proceeding under Chapter 11 to a case proceeding under Chapter 7, if it knew that the estate involved was worth far more than all the claims by bona fide creditors against it, and the Chapter 11 debtor opposed the conversion?
2. Did a bankruptcy court and the District Court commit a reversible error when they issued an order approving a compromise of a contract, securities fraud, and personal injury tort suit that was known to the respective courts below to be pending in state court?
3. Did a bankruptcy court and the District Court commit a reversible error when they issued an order approving a compromise of a personal injury tort case that involved the debtors against a non-party to the

bankruptcy proceeding, and that was known to by the respective courts below to be pending in state court?

4. Did a bankruptcy court and the District Court commit a reversible error as a matter of law when they issued an order for turnover of property belonging to a corporate entity not ever made subject to the jurisdiction of the bankruptcy court.

5 Did a bankruptcy court commit a reversible error law when it granted a trustee's motion for an order approving the use of property of the estate outside the ordinary course of business?

I. PROCEDURAL HISTORY

1. Debtors filed a voluntary petition under Chapter 11 of Title 11, the U.S. Bankruptcy Code ("the bankruptcy code"), on October 24, 1991.

2. Debtors' purpose in filing their petition was to preserve all their assets until a pending lawsuit in California Superior Court ("state court action") was tried, and, by application of expected substantial damages resulting to the debtors' benefit therefrom, meet any and all personal obligations stayed until the trial in State Court.

3. The plaintiff in the state court action against Debtors is State of the Art, Inc. ("SOTA"). In a second action, Debtors have sued State of the Art, Inc., TA Associates, Robinson Stephens, and Barcott Security and Investigation ("Barcott"). These two suits have been joined into one action, now pending in state court.

4. The state court trial was scheduled to commence upon separate and independent state grounds in February, 1992 (four months after the filing of Debtors' petition under Chapter 11).

5. At all times mentioned herein, the Debtors have vigorously maintained their personal balance sheet

solvency before and after the filing of their petition under Chapter 11 of the bankruptcy code.

6. At all times since the Debtors filed their voluntary petition, to the present date, the Debtors have affirmatively acted to preserve the assets of the estate to the immediate benefit of their creditors, and then as to themselves as the lawfully entitled beneficiaries to the post distribution of the assets of the estate.

7. Upon no less than three separate occasions the Office of the U.S. Trustee, as an "Interested Party", has moved the bankruptcy court to either convert this "Case From Chapter 11 to Chapter 7"[8], or to "Convert Case From Chapter 11 to Chapter 7, To Dismiss Case"[9].

8. In each of the above motions brought by the Office of the U.S. Trustee, the fact of the debtors' solvency was not addressed. Without any warning or other manner of contact with the debtors, the Office of the U.S. Trustee alleged procedural defalcations upon the part of the debtors as grounds for its respective motions, pursuant to **11 U.S.C. §1112(b)**.

9. In response to each of the above motions by the U.S. Trustee to either convert and or to dismiss the case, the Debtors duly filed opposing papers demonstrating they had timely performed their personal obligations to the bankruptcy code in both a procedurally and substantively correct manner, and that

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[8] This first motion was filed only 42 days after the initial petition was filed by the Debtors under Chapter 11 of the bankruptcy code. See Docket Entry 7, U.S. Trustee's Motion filed 12/5/91. [E.R. 4]

[9] The second two motions from the Office of the U.S. Trustee were filed on April 30, 1992 (Docket Entry 65) [E.R. 5]and August 26, 1992 (Docket Entry 84)[E.R. 6], respectively. The second of these two motions was filed almost a month after the Debtors timely filed their plan, pursuant to the Court's order.

their attorney had simply failed to timely file the documents and funds provided to him.

10. On or about June 15, 1992, the bankruptcy court entered an order mooting the U.S. Trustee's second of three motions to convert or dismiss this case, and further ordered the Debtor's to file their Disclosure Statement and Plan by July 28, 1992[10].

11. On July 28, 1992, Debtors did timely file their Disclosure Statement and their Plan of Reorganization, pursuant to the bankruptcy court's June 15, 1992 order[11].

12. On or about August 26, 1992, the Office of the U.S. Trustee filed its third motion to convert or dismiss the pending Chapter 11 case, and a hearing was scheduled for October 8, 1992[12].

13. On or about September 16, 1992, the Office of the U.S. Trustee filed "Comments" in the case, generally questioning the adequacy of the proposed plan[13].

14. On or about October 8, 1992, the bankruptcy court conducted a "Hearing", and orally ordered a conversion of the case from a Chapter 11 case to a case proceeding under Chapter 7[14].

15. On or about October 15, 1992, the bankruptcy court entered a Notice of Appointment/Acceptance of Trustee, Ronald Clear[15].

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[10] See Docket Entry 71, June 15, 1992.

[11] See Docket Entries 76 and 77, July 28, 1992.

[12] See Docket Entry 84, August 26, 1992. [E.R. 6]

[13] See Docket Entry 91, September 16, 1992.

[14] See Docket Entry --, October 8, 1992 [E.R. 7].

[15] See Docket Entry 99, October 15, 1992 [E.R. 8].

16. On or about October 26, 1992, the bankruptcy court entered an "Order Granting Motion To Convert Case From Chapter 11 to Chapter 7 by U.S. Trustee Appointed Trustee"[16].

17. On or about October 28, 1992, the bankruptcy court issued a "Notice of Entry of Judgment Re: Order" (affirming the conversion order as described in ¶16., above)[17].

18. A secured creditor, Sunwest Bank, filed a motion for relief from stay (its first such action to be filed) on or about January 31, 1992[18], and ultimately a hearing was held on or about April 20, 1992, upon that motion[19]. The motion of Sunwest Bank was denied, and a denial order was entered on or about April 27, 1992.

19. On or about September 4, 1992, Sunwest Bank again filed a motion for relief from stay[20].

20. On or about October 2, 1992, the U.S. Trustee was joined in its motion for conversion or dismissal by secured creditor Sunwest Bank[21].

21. Notwithstanding Sunwest Bank's legitimate and undisputed secured claim upon its note (including all

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16 See Docket Entry 100, October 26, 1992.

17 See Docket Entry 101, October 28, 1992.

18 See Docket Entry 25, January 31, 1991..

19 See Docket Entry --, April 20, 1992

20 See Docket Entry 90, September 4, 1992.

21 See Docket Entry 95, October 2, 1992 . Secured Creditor Sunwest Bank held a mortgage upon Debtors' home, and a note which principle balance was in excess of $500,000.00. Debtors had submitted a Certified Appraisal showing a concurrent market value of $850,000.00. Clearly the estate held a substantial cash equity interest in the real property sought by secured Creditor Sunwest Bank to be removed from the corpus of the estate.

interest and cost protections under the note), Sunwest alleged in its moving papers a Fair Market Value (FMV) for its security interest that was absolutely disputable, and opposed by Debtors' supplied Certified Appraisal, in an opposing memorandum. In short: although the principle, interest and costs covered by the original note held by Sunwest Bank were valid, the dispute over FMV was a bona fide dispute.

22. After multiple episodes of briefing and counter-briefing by Sunwest Bank and the Debtors in conjunction with several unsecured creditors also opposed to Sunwest Bank's motion for relief from stay, the bankruptcy court nevertheless granted the motion by Sunwest Bank.

23. Within two months after the Debtors filed their petition for relief under Chapter 11, disputed creditor SOTA, Plaintiff in a state court lawsuit, presently stayed pursuant to **11 U.S.C. §362**, began a succession of filings in the bankruptcy case that ultimately comprised 21 of the first 106 docket entries, an amount equal to 25% of all the papers filed by all other parties during the first year of proceedings in this case[22] (October 24, 1991 - October 30, 1992). These first year filings by SOTA included numerous motions for relief, objections, and repeated joinders in the motions for dismissal or conversion filed by the Office of the U.S. Trustee.

24. After two years of SOTA's flooding the bankruptcy case with legal briefs, objections, and motions, SOTA's standing as a creditor in the bankruptcy case is "contingent" upon its disputed claim[23].

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[22] See Docket Entries: 15, 16, 18, 20, 23, 24, 28, 37, 39, 44, 45, 48, 50, 68, 73, 74, 75, 78, 87, 103, 106.

[23] Even though SOTA's claim has been at all times in this case unliquidated, and thereby contingent, it had filed a joinder in support

25. **Nature of state court case No. 1:** On or about 31 December, 1990, disputed creditor SOTA filed a lawsuit against Debtors in Superior Court of the State of California, for the County of Orange, Case No: 645934. Disputed creditor SOTA alleged therein that Debtor, Charles Milden, misappropriated trade secrets; breached a contract; converted assets belonging to SOTA; slandered its product; other manner of theft or embezzlement which can only be revealed to SOTA by "Accounting" (fishing?); that all such alleged misappropriated property that can only be determined after "Accounting" is held in "constructive trust"; that Debtor Charles Milden has by unstated means formed a "constructive trust" in order to "vex, injure, or annoy" SOTA; and that Debtor Charles Milden should be subjected to an injunction entered by the California Superior Court. For such manner of vague and unsupported allegations, SOTA demanded "in excess of $6,000,000.00", and multiple elements of other relief.

26. Debtor Charles Milden has denied all such claims, but the cloud of litigation hanging over his head during the better part of 1991 caused him great damages in terms of his professional reputation and his ability to work unburdened in his professional field.

27. **Nature of State Court case No 2:** On or about May 20, 1992, Debtors filed an action against the disputed creditor, SOTA, in Superior Court of the State of California, in and for the County of Orange. Also named were TA Associates, Robinson Stephens, and Barcott Securities, each of whom were not creditors to the bankruptcy case below. Within their suit against the four defendants in the state court case, Debtors claimed eight means and manners of unlawful and tort abuse

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of a motion by the U.S. Trustee to convert this case to a Chapter 7. See: Dkt #18 [E.R. 9]

involving breach of contract, securities fraud, and personal injury tort offenses, committed by SOTA and the other three defendants upon SOTA's retained behalf, and directed at the Debtors, personally.

28. The two state court actions were subsequently joined into one case, now pending before that California Superior Court.

29. These issues, each of them, arise strictly under California state law.

30. These issues are based upon state grounds that are ***separate and independent*** of any federal grant of jurisdiction.

31. At no time during the proceedings in the bankruptcy court has any party timely sought or otherwise applied or attempted to remove the stayed pending state court action to the jurisdiction of the federal district court, pursuant to **28 U.S.C. §1452** and **Bankruptcy Rule 9027.**

32. Since the beginning of October of 1992, and in particular during the succession of hearings through the course of 1993 that relate to 'trustee' negotiated compromises, the bankruptcy court has repeatedly made conclusory comments, judgments, rulings, and issued orders that have involved its own considerations of the merits of the action pending in state court.

33. The bankruptcy court and all parties (undisputed and disputed) necessarily knew, and knew of, Debtors' multiple objections and various motions in opposition to any involvement by a federal bankruptcy court of limited jurisdiction, into matters arising under California law and pending in a state court of general jurisdiction.

Three bankruptcy court orders appealed from to district court:

34. On or about March 18, 1993, the bankruptcy court approved each of the settlements with SOTA, TA Associates, and Robinson Stephens. During the hearings relating to the above, the court made numerous references to its own estimation of the value of the litigation pending then in state court.

35. On or about April 29, 1993, the bankruptcy court entered an order granting a motion by the trustee for turnover of documents [24]including the books and papers of Debtors' (inactive) corporation, In Communication, Inc. ("ICI"), a separate entity under state law that had never been noticed or summoned to appear in the bankruptcy case. Debtors were aware that the disclosure of the information contained in the ICI papers would be of potential unfair business advantage to SOTA and other unknown parties in post bankruptcy future ventures by these Debtors through this independent corporation that was never properly subjected to the jurisdiction of the bankruptcy court.

36. On or about September, 1993, the bankruptcy court entered an order granting a nunc-pro-tunc motion by the trustee for use of assets of the estate out of the ordinary course of business that involved trustee activity not authorized by California law, nor otherwise authorized by the By Laws of an affected corporation that had never been summoned or otherwise appeared in the pending bankruptcy case.

37. Debtors timely appealed the bankruptcy court's order that granted the SOTA/TA Associates/Robinson Stephens compromises (SA CV 93-597). **[ER Pages 8-20]** This order compromised an action containing a combination of contract, fraud, securities fraud, and

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[24] See Docket Entry 186, April 29, 1993 [E.R. 10].

personal injury tort, claims by Appellant against SOTA/TA Associates/Robinson Stephens. By its nature, and by the parties' testimony given in its support, there arose for the first time the conclusive evidence that SOTA had known that it had filed a false claim against the debtors estate.

38. Debtors timely appealed the bankruptcy court's order granting a trustee's requested turnover order of property that was alleged by debtors not ever to have been property of the estate, or was property properly vested in the debtors name upon grounds contained in the above paragraph 35 - that a false claim had been filed by an adverse party to the debtors had ultimately been at the root of the frustration of the debtors successful retirement of their obligations to their bona fide creditors (SA CV 93-616). **[ER Pages 8-20]**

39. Debtors timely appealed the bankruptcy court's order granting a trustee's requested order granting use of property of an estate out of the ordinary course of business (SA CV 92-1122). **[ER Pages 43-58]**

District Court Ruling disposing the above three appeals:

40. The district court affirmed the bankruptcy court's above three orders in a ruling filed June 2, 1994, upon grounds that are timely appealed from herein. **[ER Pages 74-83]**

A fourth and fifth bankruptcy court order entered and appealed from:

41. On or about April 13, 1994, the bankruptcy court entered two orders that 1) granted a trustee negotiated compromise between a non-creditor, Barcott, and the debtors, involving issues solely relating to each of the debtors' separately alleged personal injury tort damages; and 2), an order denying the debtors' alleged

timely filed exemptions covering all proceeds and claims pending in the California Superior Court case that had never been removed to the jurisdiction of the district court.

42.. Debtors timely appealed the bankruptcy court's order granting the trustees motion to compromise the debtors' case against Barcott (SACV 94-456-GLT); and the bankruptcy court's order denying the debtor's alleged timely filed exemptions covering all proceeds and claims pending in the California Superior Court (SACV 94-457) **[ER Pages 129-150]**

District Court Ruling disposing of the above two appeals:

43 On or about September 22, 1994, the district court entered a Ruling on Appeal that affirmed the bankruptcy court's two orders upon grounds that are timely appealed from herein. **[ER Pages 193-200]**

44. On or about November 15, 1994, the Clerk for the Ninth Circuit Court of Appeals filed an order granting Debtor's requested permission to further consolidate into one appeal the five orders originally appealed from in bankruptcy court and subsequently consolidated into two actions in district court. These consolidated actions are Appeal Nos. 94-56151 and 94-56503.

II. ARGUMENT

OVERVIEW

The arguments presented in this appeal each rely upon a common complaint issue. That issue is that both the bankruptcy court and the district court in this case have exceeded their judicial powers when issuing orders that have granted motions, or affirmed the orders granting the motions, complained of herein.

Both the United States Bankruptcy Court for the Central District of California, at Santa Ana, and the U.S. District Court for the Central District of California, have exercised powers over and against the Appellants that do not obtain to any branch of the federal government, and specifically are not availed to any federal court.

Both the bankruptcy court and the district court usurped their authority as granted by the U.S. Constitution under Article III to the Supreme Court, and also as granted by the U.S. Constitution under Article I to the Congress, then by Congress by statute to the Article III courts by means of statutes in all of title 11 and title 28.

Accordingly, underlying all the argument below lies the fundamental complaint by the Appellants that the bankruptcy court and the district court have issued orders in excess of their federal jurisdiction.

To find its jurisdiction, a court must determine the source of the power sought to be used. Here, the only governmental power available to be used by the federal bankruptcy and district courts to convert the ongoing Chapter 11 case of the Debtors originates in Article I, Sec. 8, Clause 4 of the U.S. Constitution. The Congress is ordered by the Constitution to *"establish"* the *"uniform laws on the subject of bankruptcies"*. Significantly, it is to be noticed that Congress obtains *no* substantive powers to alter the laws of the several states that regulate individual property rights, either directly or implied.

When an ***insolvent*** estate is being liquidated to satisfy its creditors, the debtor by contract, or by other provision of *state law*, has forfeited his property rights to its estate in favor of its creditors, to the extent of the valid claims against the debtor for its debt. Under state law, the debtor has no legitimate property right remaining in an insolvent estate. State law neither grants property rights, nor deprives them, between parties. State law

simply functions to recognize, respect, and to protect private property rights.

It is individuals through their dealings with each other that create respective rights and interests in property. All law, state and federal, that regulate the rights of property are subject to the due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, as imposed upon the federal and the state governments.

The *uniform laws of bankruptcy* act to fairly administer the liquidation of the estate, and apportion to the entitled recipients under state law that which is rightfully already theirs -- *under state law*.

No provision of the U.S. Constitution in Article I, Sec. 8., Cl. 4., the bankruptcy clause, nor any other Section of Article I, grants to Congress the power of altering the laws of the State of California, or any other state, that protect individual property rights.

No provision of the U.S. Constitution in Article II, the powers granted to the President, grant to the executive branch any authority to alter the laws of the State of California, or any other state, that protect individual property rights.

No provision of the U.S. Constitution in Article III, the powers granted to the U.S. Supreme Court, authorize a federal judge to use its judicial powers to alter the laws of the State of California, or any other state, that protect individual property rights.

No provision of California law allows for an outside entity, either private or governmental, to disturb individual property rights over the objections of the individual asserting the rights, without *due process* of law resolving the dispute through the California State Courts, and under the California state law applicable to the issues of the pending case.

The Supreme Court has made clear that:

> "[t]he theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are of limited and defined powers." See: **Loan Associates v. Topeka, 20 Wall. 655 (1874), at 663.**

Mindful of the above, when the debtors challenged the court orders that caused them the deprivation of their property, the bankruptcy court and the district court must have disclosed within their respective decisions overruling those objections and appeals precisely what affirmative grant of authority was used to overcome the debtors' private property right -- or the order is subject to accountability to this court.

Examination of every order and appeal complained of here reveals that neither the bankruptcy court, nor the district court, has asserted *any* affirmative authority, justly derived from the U.S. Constitution, to deprive the Appellants of even one penny of their private property in excess of that owed to their bona fide creditors.

The U.S. Constitution is affirmed by the Tenth Amendment to be the exclusive source of any authority to the federal government in all its three branches.[25]

> "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted,

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[25] **See: Article X of the Amendments to the U.S. Constitution** (Ratified by nine of fourteen states in 1791), as follows: *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."*

> that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified." -- ***United States v. Sprague*, 282 U.S. 716, 733 (1931)**
>
> "The [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." -- **United States v. Darby, 312 U.S. 100, 124 (1941)**
>
> "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it ..." *2* ***Annals of Congress* 1897 (1791)**

This case presents a situation where neither the Congress, nor the Constitution, has specifically asserted a power to deprive the Appellants of their exclusive possession and exclusive control of their property. The bankruptcy court and the district court have presumed powers to their respective courts that cannot have been delegated by the only two sources of powers availed to any courts in the federal system of government.

a. The bankruptcy court and the District Court committed a reversible error when they each approved a conversion of a case proceeding under Chapter 11 to a case proceeding under Chapter 7, because they each knew that the estate involved was worth more than all the claims by bona fide creditors against it, and the Chapter 11 debtor opposed the conversion.

On or about October 8, 1992, the bankruptcy court determined, pursuant to a U.S. Trustee's motion and joinder by two creditors, that it would issue an order converting the Debtors' pending Chapter 11 case to a case proceeding under Chapter 7, and authorize a liquidation of the Debtors' estate that included untried claims of the debtor against others (including a disputed creditor). The bankruptcy court's order was challenged upon both statutory and constitutional grounds to the district court.

The district court peripherally addressed the statutory challenge in its appeal ruling, but neither the bankruptcy court nor the district court has ever explained in substantive terms any just and constitutionally derived power to capriciously order a Chapter 7 conversion of a solvent estate over the objections of the rightful owners of the private property, and over the objections of the remainder of the unsecured creditors except a disputed creditor subject to a multi-million dollar suit pending in a state court.

The specific issue here, is that individual property rights protected by the *due process* clause of the Fifth Amendment of the U.S. Constitution, are not subject to discretionary whim and caprice of the non-tenured Article I bankruptcy judge, nor even within any arguable discretion of the Article III court under non-bankruptcy federal law, which is served either by

reference of jurisdiction to the non-tenured bankruptcy judge or by an Article III federal judge.

Congress has broad stated powers under Article I, Sec. 8, Cl. 4, of the Constitution, ... *"To establish ... uniform laws on the subject of bankruptcies throughout the United States..."*, but no power derived from the U.S. Constitution, and delegated to Congress, may be argued to exist that portends to impart a discretionary redistribution of private wealth that is apart from an insolvent estate.

Yet, that is exactly what the government (through its U.S. Trustee) and the courts below have proposed in their orders below.

Presented above in paragraphs 7 through 17, the U.S. Trustee upon three occasions had brought to the bankruptcy court its motions for conversion, and, in the latter two of said motions, had included an alternative of dismissal.

The last of these three motions was filed on August 25, 1992, and was made pursuant to **11 U.S.C. §1112(b)**.

Within all the documentation supplied by the U.S. Trustee, there is conspicuously absent any statement as to:

1) a reasonable estimate of the Debtors' solvency;

2) its premise for requesting a "conversion" to Chapter 7;

3) any disclosure to the Debtor that the Debtor may voluntarily opt-out of a voluntary Chapter 11 anytime prior to confirmation of a plan; and with reference to **11 U.S.C. §1112**; that the all the provisions of subsections **(a)**, **(b)**, and **(d)**, are subject to the limitations imposed upon the bankruptcy court by subsections **(c)** and **(f)** of **11 U.S.C. §1112**, pursuant to subsection **(e)** of **11 U.S.C. §1112**.

The Debtors are not a farmer or corporation. Therefore, subsection **(c)** of **§1112** does not apply; but

subsections (e) and (f) of §1112 *do* apply since the Debtors would not have otherwise then (or now) qualified for an involuntary commencement of a Chapter 7 case. The Office of the U.S. Trustee made no reference to its, or the bankruptcy court's, limitations under §1112(f). In order to invoke the involuntary jurisdiction of Chapter 7 under title 11, there must be a showing that either a debtor is insolvent or refusing to pay legitimate obligations.[26]

1. **There was no showing of insolvency or recalcitrance regarding the debtors' willingness and/or its concern for its legitimate obligations.**

The Office of the U.S. Trustee made no showing or otherwise any allegation or representation in its motion for conversion/dismissal that the Debtors were not able or willing to meet each and every obligation to their creditors under law[27]. Neither did, nor could, the bankruptcy court judge make any such nature of

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[26] While Debtors do not dispute the bankruptcy court's broad discretion entertaining considerations of dismissal, such considerations for dismissal must always lay predicate upon the legislative background to the statutory authority relied upon by the court when entering its order. See: **In Re: Nikron, Inc., 27 B.R. 773, 10 BCD 335 (BC ED Mich, 1983).** Bankruptcy court may not dismiss or convert a case proceeding under Chapter 11 where schedules filed by the debtor are substantially accurate, economic condition necessary to justify bankruptcy proceeding exists, and filing itself is in "good faith". **In Re: McLaury 9 BCD 1231 (BC ND Tex. 1982)**

[27] Not only did the court fail to address the congressional intent under Chapter 11, reorganization, it issued its order converting the case [Dkt# 100, Oct 26, 1992] without allowing the hearing upon any oppositions to the Debtors' Disclosure Statement and Plan (noticed to occur Sep 17, 1992, on Aug 8, 1992, Dkt# 79, and continued from September 17 to Nov 5, 1992, pursuant to order issued on Sep 17, 1992, Dkt# -- following Dkt#92).

showing or allegation when it converted the case[28]. Accordingly, the bankruptcy court's grant of the conversion element of the conversion/dismissal motion was perpetrated without lawful authority, and is therefore void. See **Rule 60(b)(4), F.R.Civ.P.**, invoked pursuant to **Bankruptcy Rule 9024.**

2. Conspicuous procedural defalcations marked the motion for conversion/dismissal.

Furthermore, even if there was a reasonable belief that the debtors might be insolvent or obstructive in their management of their case (which they were not), two of the three movants to this particular action (SOTA and Sunwest Bank were themselves not qualified to join into such a motion. **11 U.S.C. §303(b)(1)**, requires that there must be three or more entities when the aggregate number of creditors exceeds twelve (in this case the number of creditors was approximately sixty), and that *"each of which is ... a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute..."*. SOTA, the only unsecured party supporting the U.S. Trustee's motion for conversion or dismissal, held an un-bona fide claim because it was contingent.

11 U.S.C. §303(c) allows a creditor to join a petition (or presumably a conversion motion) only if that creditor is *"holding an unsecured claim that is not contingent"*. Sunwest Bank's claim was secured, not unsecured. If there was an unsecured claim nested within its assertions to the bankruptcy court, those claims are disputed, and therefore contingent. In like manner, SOTA's claim is wholly disputed and conspicuously contingent.

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[28] Debtors' Plan and Disclosure Statement contemplated full payment to all legitimate creditors.

In the absence of three unsecured creditors holding claims that are not contingent or subject to a bona fide dispute, and are further not in an aggregate amount at least $5,000.00 in excess of any secured lien, the bankruptcy court judge has been improperly petitioned by the U.S. Trustee, and SOTA, and Sunwest Bank, as co-petitioners for a conversion (notwithstanding the Appellants' acknowledgment that a dismissal is within the discretionary realm for "good cause showing".

Neither SOTA, nor Sunwest Bank, met the requisite qualification of **§303(b)(1)** to have been a valid party to such a motion. All parties signing the papers moving the bankruptcy court for conversion/dismissal, and joining such a motion, necessarily knew of the limitations of **§303(b)(1)** upon involuntary conversion invoked by **§1112(f).**[29]

Even a final order by a bankruptcy judge, entered in conflict with controlling federal statutory authority, would be by its nature void, pursuant to **Rule 60(b)(4)**[30], **F.R.Civ.P.**[31], made applicable to cases proceeding

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[29] The limitation imposed by **11 U.S.C. §1112(f)** is a jurisdictional limitation. The wording and clear intent of Congress is that -- "... a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.", and such clear meaning of those words is that the jurisdictional grant to federal courts, pursuant to **28 U.S.C. §1334**, is constrained to the conditions congressionally imposed by statute. Thus, jurisdiction per se is not only the power of the court to hear and determine, but also the power to render the particular judgment entered, and every act of the court beyond its jurisdiction is void. See generally: **People v. Siman, 119 N.E. 940, 284 Ill. 28.**

[30] A void judgment is a legal nullity and may be challenged not only directly but also by collateral attack. **Gracielle v. Star Guidance, Inc., 66 F.R.D. 424 (D.C.N.Y 1975).**

[31] Judgment rendered in the absence of jurisdiction is a legal nullity, inable to ripen with age into a valid judgment. **Vecchione v.**

under title 11 by **Bankruptcy Rule 9024**, because the judge would lack authority to enter such an unauthorized order in the first instance. Such an act would be *ultra virus*[32], and thus void.[33]

3. The debtors have always had a solvent estate.

In this case, the estate was solvent. Review of the debtors' submitted declaration (App. pp.) reveals that there were approximately $580,000.00 (mortgage) + $35,000.00 (auto loan) + $76,937.00 (misc. unsecured) owed to bona fide creditors under state law, against $896,050.00 of equity in physical assets. The dispute in this case involves $10 million pending in the Debtors contingent claims against SOTA, TA Associates, Robinson Stephens, and Barcott, more than offsetting SOTA's contingent claim of $6 million against the Debtors.

To ease the burden of arithmetic, this means that if only the Debtors' undisputed balance sheet is reviewed, that the Debtors held a property right protected under the

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Whigemuth, D.C. Pa. 1977, 426 F.Supp. 1297, affirmed 558 F.2d 150, certiorari denied 98 S.Ct. 439, 434 U.S. 943, 54 L.Ed. 2d 304.

[32] For a judgment to be void, it must be determined that the rendering court was powerless to enter it. This circumstance may arise if the challenged court's action involves plain usurpation of power or if the complained of court has acted in a manner inconsistent with due process of law. See: **V.T.A., Inc. v. AIRCO, Inc., 597 F.2d 220 (10th Cir. 1979)**, See also: Sonus Corp. v. Matsushita Elec. Industrial Co., Ltd., 61 F.R.D. 644 (Dist Ct. Mass. 1974), "A judgment is "void" if the court rendering the judgment acted in a manner inconsistent with due process.

[33] See **Edgar v. Mite Corp. 457 U.S. 624 (1981)**, at 653, Mr. Justice Stevens concurring, states: "Federal courts are courts of limited jurisdiction. ", referencing in footnote: **Ex Parte Bollman, 4 Cranch 75, (1807)**, at 93, "... this court deems it proper to declare that it disdains all jurisdiction not given by the constitution or by the laws of the United States."

Fifth Amendment of the U.S. Constitution[34], that was worth **$204,112.00**. If the contingent claims are factored into the picture and both sides of the Milden/SOTA dispute are deemed valid by the demanded jury in the state court case, the figure increases to a ***net worth*** of the Debtors of **$3,482,684.45**. Finally, if Milden should prevail, and SOTA should not prevail, then the Debtors' ***net worth*** becomes **$9,482,684.45**.

Since SOTA has already admitted a shareholder fraud against the Debtors, and has further fought hard in these appeals to pay the estate $100,000.00 in order to conceal that fraud, an analysis contemplating SOTA prevailing against Milden loosing would not be even relevant at this juncture.

That's it The Debtors were solvent to a ***net worth*** figure somewhere between $204,112.00 - $9,482,684.45. The ***due process clause*** of the Fifth Amendment of the U.S. Constitution protects the Debtor's property rights to their ***net worth***.

Neither the federal judges of any federal court, nor the state judges of any state court, possess a justly derived power by decree or by authorization to another entity (such as a trustee), to deprive any *solvent* debtor of its private property interests, claims in action pending in courts of law, nor any other substantive rights that are protected by substantive law (state law). It is not judges that determine the substantive rights -- it is the laws of the cognizant state that do. In this case California is the cognizant state. The bankruptcy judge, being learned in the law, knew that he had no power to convert a solvent Chapter 11 case to a Chapter 7

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[34] "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." **Louisville Bank v. Radford, 295 U.S. 555 (1935), at 589.**

liquidation. The district judge, also learned in the law, also knew he had no power to affirm such an order.

4. The bankruptcy court and the district court violated the Debtors' *due process* protections relating to their private right to property.

In its *order* dated June 2, 1994, the district court observed that an *"order"* converting a debtor's case to Chapter 7 could *"determine or seriously affect substantial rights or cause irreparable harm"*. The district court further observed that *"[a]n order converting a debtor's case to Chapter 7 has been held to meet this standard, since it substantially affects the debtor's rights to his property"*.[35] The district court went further by observing that Appellants' case was converted to Chapter 7 by an *"order"* entered October 28, 1992, and then observed that Appellants had submitted a motion for reconsideration (in which they proclaimed their solvency and claimed their property rights protected under our Constitution), and that the motion was denied (by yet another *order*)on November 10, 1992.

To deprive any private person, debtor under title 11 or otherwise, of its legitimate private property interests under state law in spite of no authority under law to do so, is a violation of the due process clause of the Article 5 of the Amendments to the U.S. Constitution. An *order* is not a law. Federal judges, federal courts, clerks of federal courts, attorneys practicing before federal courts, and trustees appointed by federal courts, do not possess one scintilla of legislative (law making) authority. Any attempt to do so anyway (consciously or otherwise) is a flagrant abuse of their official power.

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[35] In re Reboror, 89 B.R. 314, 321 (N.D.N.Y., 1988).

The district court continued upon its vein to by this time discredit the issue of unlawful conversion of the Debtors' case brought to its court. It claimed that the debtors' argument against the conversion (similar as stated above) had been presented with *"no authority"*. To the contrary, the Debtors had actually presented a compelling authority. Presented in their argument was a definitive prohibition from Congress to federal court judges in the form of an instruction that no case shall be converted *"unless the debtor may be a debtor under such chapter."*

The district judge saw the authority, because he quoted it in the sentence prior to the one he wrote claiming that *"the debtors provide no authority for their argument."* Upon consideration of the text of the words written by the district judge, a reasoned mind may only conclude that the district judge does not recognize the *"authority"* of Congress, and considers that an *"order"* is a law.

In respect for the fundamental principle of law intended by our founders when creating our governments, Debtors submit to this Court that they have absolutely no obligation to 'out argue' any *"order"* that may have been entered without constitutionally derived statutory authority, and that any *"order"* entered over controlling statutory authority to the contrary is a nullity. It is void. It never happened.

Furthermore, Debtors vehemently assert that their claimed rights to their property are rights created through business intercourse with all other private citizens. These are rights held above any *"order"* from any court, absent a specific statutory regulation of property rights, justly derived from our constitutions (state and federal) to the contrary. This means that it is the courts (and not the private party claiming the rights sought to be protected) that are affirmatively burdened to clearly state their own authority (derived from a just

statute) that is superior to a private party's right to property. The bankruptcy court and the district court declared no applicable just statutory authority in support of any of the *orders* appealed from here. Neither the bankruptcy court, nor the district court, could do so because no such authority exists in law.

The bankruptcy court and the district court each *abused* their respective *discretion's* when contemplating, filing, and entering, their orders on appeal, by ignoring the burden imposed by law upon the courts who would presume to destroy the Debtors' private property rights by means of conversion of the Debtors' case. Clearly, neither federal court has provided any authority justly derived from the Constitution that shows any burden upon the Debtors to argue to preserve that which is theirs, and protected by the Constitution.

Upon its face, this Court is commanded by the *due process* clause of the Fifth Amendment to reverse the orders granting and affirming the conversion, and all other orders compromising valid lawsuits in a state forum, ordering turnover of assets (including those belonging to third parties never lawfully brought under the jurisdiction of the federal courts), and an order granting to a trustee that was never lawfully appointed the retroactive power to use assets of the estate in a manner that is not compliant with state law governing its acts.

b. Re: District Court Case No. SACV 93-597: The bankruptcy court and the district court each abused their judicial discretion when granting and affirming an order of compromise of litigation against SOTA, TA Associates, and Robertson Stephens.

The bankruptcy court judge was without any authority under our Constitution, and under any just federal or

state law, from entering an order compromising an action in a state court forum. The district court judge was without any authority under our Constitution, and under any just federal or state law, from entering an affirmation of an order compromising an action in a state court forum. The reasons for the lack of authority stated above are as follows:

1. The compromise was arranged by a court appointed Chapter 7 Trustee, who was appointed upon usurped authority by the bankruptcy judge, as described in part a.

2. The compromise between the trustee and the adverse parties settles in the Debtors' favor any question of their solvency, and is sufficient 'newly discovered information' to reverse the conversion, eliminate the trustee and his attorney, and to allow the still pending state court suit to go to its demanded jury trial.

3. The compromise between the trustee and the adverse parties rewards an entity filing a fraudulent claim in a case proceeding under title 11, a federal crime under **18 U.S.C. §152**, and imposes a duty upon the judge to report the crime to the U.S. Attorney's Office, pursuant to **18 U.S.C. §3057**.

4. The compromise between the trustee and the adverse parties creates the appearance of an untoward relationship between the negotiating parties, in that the trustee may only acquire funds to pay his fees from these parties, and he is compelled under that circumstance to negotiate using someone else's' property in order to become paid.

5. The bankruptcy court and the district court have each ignored and thus condoned the above circumstances (b.1. through b.4.), and have thereby tolerated a condition where the trustee has constructed a relationship between himself and the other negotiating parties that is adverse to the best interests of the estate.

6. The bankruptcy judge admitted that he formed an opinion upon the value of the litigation in state court prior to granting the trustee's motion. The bankruptcy judge formed such an opinion in clear absence of any subject matter or personal jurisdiction over the issues or parties in the case pending in state court. That case had never been removed to the district court, pursuant to 28 U.S.C. §1452(a)

For the six reasons stated in this part b, the district court is required by application of the due process clause of the Fifth Amendment to the U.S. Constitution, to find that the bankruptcy court judge, and the district court judge, have each abused their judicial discretion by allowing Debtors' right to private property right to civil redress to be "compromised". The order granting the "compromise" necessarily included the bankruptcy judge and the district court judge to function in a judicial capacity over matters that are not, under any otherwise obtainable fashion, subject to the jurisdiction of the federal courts. This Court should reverse the order compromising the litigation pending now in state court because it was considered upon the merits of a case over which the bankruptcy court had no jurisdiction, and entered without any statutory or constitutional authority.

c. Re: District Court Case No. SACV93-616: The bankruptcy court and the District Court each abused its judicial discretion when granting and affirming an order approving a trustees' motion for turnover of assets properly remaining in the control and possession of the rightful owners, the Debtors and other third parties never noticed or summonsed to appear in the bankruptcy case.

The bankruptcy court judge is without any arguable authority to issue any orders purporting to grant an unlawfully appointed trustee the right to possession and

~~control of assets that either belong to the Debtors, or~~ otherwise are not the property of the Debtors, and which other assets are the actual property of third parties not ever noticed and summonsed to appear in the bankruptcy case. Such an act is an act committed ultra vires, and although each judge of the two courts below have been duly informed of the nature of this offense, each has flippantly disregarded its duty.

This Court is required by the due process clause of the Fifth Amendment to observe that the private property rights of the Debtors and others are endangered by the order granting turnover and the affirmation entered by the district court. Such a recognition requires a reversal of the turnover order and remand to bankruptcy court for orderly administration of the debtors' Chapter 11 case.

d. Re: District Court Case No. SACV 92-1112: The bankruptcy court and the district court necessarily abused their judicial discretion's when they granted a trustee's motion and affirmed that order authorizing a trustee to commit certain acts as a shareholder and officer of a California corporation which had never been subjected to the jurisdiction of the bankruptcy court, nor had been in any manner noticed of any orders or other official acts relating to the operation of its business.

The bankruptcy court and the district court granted a trustee authority to use assets of the estate in a manner not authorized by the By-Laws of a California corporation, and not pursuant to any California law. Such conduct by any individual is not permitted by any provision of the United States Constitution, nor any provision of federal law, or the common law controlling federal court appointed fiduciaries. The bankruptcy judge could not authorize the trustee to commit any act

that is unlawful to an ordinary person in whose shoes the trustee may portend to stand.

This Court should reverse the order authorizing the trustee to use assets of the estate (stock certificates). Further, this Court should order that the district court see to it that trustees and bankruptcy judges abide by state law and corporate By-Laws to the same extent as an ordinary person engaged in a similar task with the same object in view.

e. Re: District Court Case No. SACV 94-456 GLT, and District Court Case No. SACV 94-457 GLT; The bankruptcy court and the District Court abused their discretion when they authorized a trustee's to compromise litigation pending in state court, and involving exclusively the Debtor's personal injury tort claims against third parties who were not otherwise parties in the ongoing bankruptcy case.

The bankruptcy court and the district court issued orders approving the trustee's compromise of litigation pending in state court that presented issues that were exclusively personal injury tort claims of the Debtors against a third party not a party to the bankruptcy case. A jury demand had been entered in the pending state court case. Bankruptcy court has no jurisdiction to hear or otherwise consider, influence, or scuttle, a case expressly barred to the jurisdiction referred do it by the district court. See **28 U.S.C. §157(b)(2)(O)**, and **28 U.S.C. §157(b)(5)**, where Congress has specifically deprived the bankruptcy judge of any jurisdiction to deal with personal injury tort issues. Neither court had any authority under any federal or state law to deny Debtors their motion to exempt all personal injury tort claims from the assets of their estate. personal injury tort claims are actually excepted from the jurisdiction of the

bankruptcy court, and automatically excepted from an estate under California law, as argued in Debtors' brief to the district court.

This Court should reverse the orders approving the trustee's compromise of the litigation by the Debtors against Barcott Securities, because the litigation involves issues relating exclusively to the repair of the persons of the Debtors, respectively, and they are not separable chattel to be parceled off to the benefit of the very persons who caused the personal injury, and a trustee, neither of which were "personally" injured.

This Court should also reverse the bankruptcy court order that denied the Debtors' claims for exemption of the personal injury tort claims from the assets of the estate. In the alternative, this Court may also consider excepting the personal injury tort claims as property of the estate. Under no circumstance do damage claims relating to the emotional suffering, personal reputations, professional reputations, privacy invasion, and personal character of the Debtors, become bargainable chattel for the benefit of the persons causing the damages and negotiating the compromise.

III. CONCLUSION

The debtors are entitled to that which is theirs, and are further entitled to accomplish that which Congress intended them to do when it created the relevant provisions of Chapter 11 attracting the Debtors to file their petition in the first place.. All that which has been wrongfully taken from them must be returned. This court has the power to summon all the parties responsible for the wrongful takings before it. This Court has the power and the obligation to act *sua sponte* to correct a great wrong done to the Debtors and the many legitimate unsecured creditors unjustly damaged in this case.

DISTRICT COURT CASE NUMBERS	COURT OF APPEALS CASE NUMBERS
CV-93-00597-GLT	94-56151
CV-93-00616-GLT	94-56503
CV-93-01122-GLT	CONSOLIDATED
CV-94-00456-GLT	ON APPEAL
CV-94-00457-GLT	

United States Court of Appeal

FOR THE NINTH CIRCUIT,

CHARLES G. MILDEN and
SUSAN P. MILDEN
Appellants,
vs.
JAMES J. JOSEPH, Chapter 7 Trustee,
Appellee.

On Appeal from the Final Order of the United States District Court for the Central District of California Affirming the Rulings of the United States Bankruptcy Court, Central District of California

APPELLANTS' REPLY BRIEF

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California Code of Civil Procedure section 1909 15

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APPELLANTS' REPLY TO FOUR APPELLEES' BRIEFS

This appeal is from orders constituting a federal intervention into a state court securities fraud case involving damages resulting from alleged violations of fiduciary duties by individuals and corporate entities acting under color of official corporate duty relating to a stock transfer. Secondly, this appeal is from orders constituting a federal intervention into a pending state court case involving damages arising under statutory offenses generally described as "Personal Injury Tort". The Appellees in this case are each alleged to have committed offenses against the Appellants in both of the above stated categories, *except* Barcott Security. Barcott Security is named solely for its actions involving an alleged willful and malicious invasion of Appellants' privacy and personal security, by tactics involving infliction of fear, harassment, stalking, and slander, all of which acts were designed to induce an extreme condition of emotional distress upon the Appellants.

Cutting to the core of all the arguments and alleged facts presented to this Court, is the following:

I. Non-Personal Injury Tort Issues.

In view of the above, the proper response of the bankruptcy and district courts should have been to stay any bankruptcy proceedings contingent upon the final determination of non-personal injury tort matters between the parties here on appeal because what exactly is the "property of the estate" is determined upon liquidation of Appellants' rights subject only to state court determination. The conversion of the Appellants voluntary Chapter 11 case to a Chapter 7 liquidation case was done upon pure speculation by the U.S. Trustee, the bankruptcy judge, and the district court judge, upon facts and controlling law, and that

speculation was a clear abuse of discretion. The ultimate compromise "negotiated" by the court appointed private trustee ultimately produces prima facie evidence as to the specious nature of the judgmental processes used by the federal officers involved. Alternatively, the bankruptcy court could have, and should have, simply dismissed the voluntary petition that Appellants filed for relief under Chapter 11.

II. Personal Injury Tort Issues.

Appellants had claimed multiple personal injury tort issues, pursuant to C.C.P. §704.140(a)[36], and had even declared those exemptions in a revised Schedule of Assets filed in the bankruptcy court (a debtor may revise or amend its Schedule of Assets at any time prior to the closing of a case proceeding under title 11), although the Personal Injury cause in action pending in the trial court, per se, was and is exempt without making a claim[37].

Notwithstanding the above, the Appellees have expended much time and energy in the federal and state courts in mounting their attack upon the Appellants' reservation of the Personal Injury Tort cause in action from the assets of the bankruptcy estate. Their arguments generally center over a dispute that they waged in the bankruptcy court, again in the district court, and currently in the U.S. Court of Appeals for the Ninth Circuit. Their contentions appear to lie upon the premise that Personal Injury Tort causes of action, as meant by the C.C.P. §704.140 automatic exemption clause, only applies to; 1) damages for personal bodily

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[36] See Appellants' Brief at page 6.

[37] See **C.C.P. §703.140. Federal Bankruptcy; applicable exemptions,** C.C.P. §704.140. **Personal Injury causes of action, damages or settlement; exemption; ...** "(a) ...[A] *cause of action* for personal injury is exempt without making a claim." (emphasis added)

injury, and 2) that under no circumstance could a debtor exempt its cause in action for Personal Injury Tort claims from a bankruptcy estate, or discretionary maneuvers of a bankruptcy trustee. An examination of the California statutes applicable to, and in definition of, the meaning of the words contained in C.C.P. §704.140 affirmatively refute their arguments.

In order to construct their argument that the automatic exemption provisions of C.C.P. §704.140 do not apply to the Personal Injury Tort causes in action filed by the Appellants in this case, the Appellees, generally, have circumlocuted all the controlling federal and state statutes and the common law relating to the personal nature of personal injury causes in action, and instead they have produced a veritable mountain of language and obtuse application of federal and state case law excerpts in an apparent argument to the statutory language itself. Their efforts are in vain for the following reasons:

III. Federal law or state law -- Which is controlling?

This case presents a well distinguished circumstance of federal court intervention and rulings upon issues arising only under state law, and at all times pending in a state court. A circumstance that all parties to this appeal have agreed to is that the outcome of the pending state court case represents the only asset available to the debtors' estate.

A primary issue brought generally upon this appeal is that the rights and obligations between the parties upon this appeal either should be exclusively determined in state court (as argued by the Appellants), *or* that federal courts may intervene without a removal pursuant to 28 U.S.C. §1452(a), at their discretion, convert a solvent debtor's pending Chapter 11 case into a liquidation case

under Chapter 7, and under the guise of 'judicial efficiency' resolve matters pending in the state court based upon admitted supposition upon the part of the proponents and the bankruptcy judge -- but over the objections of the debtor.

The Appellees' arguments contend that Article I, Sec. 8 of the Constitution, in conjunction with Article VI (The Supremacy Clause), "... makes federal laws the supreme law of the land." (Barcott PP 6) Appellants dispute such a sweeping generalization of the controlling law in this case. Article VI, Sec. 2, of the U.S. Constitution actually declares "This Constitution..." to be the supreme law of the land, and then it includes "...the laws of the United States *which shall be made in Pursuance thereof* ..." (emphasis added) Clearly excepted from the status of "Supreme law of the land..." are all laws, federal and state, which fail to comport with the precise wording of the Constitution. Moreover, Appellants arguments contend that the judges in the bankruptcy court and district court below, under pretense of acting in a judicial capacity, exceeded even the letter and intent of the federal statutes granting their respective courts jurisdiction to judge, influence, intervene, or in any other manner become involved in the litigation pending in state court, because what may or may not become a ***liquidated*** asset of the estate depends solely upon the outcome of the interpretation by the state court upon the issues their arising under state law. Any other influence -- under color of federal authority -- upon that process is a violation of the due process clause of the Fifth Amendment of the U.S. Constitution.

This is not a 'States Rights' issue, it is an issue that strikes to the very meaning of "Our Federalism", as expressed by Justice Hugo Black.

> "The concept [of "Our Federalism"] does not mean blind deference to "State's Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both state and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate interests of the States."[38]

Appellants fully agree that the "National Government" should be able to always "vindicate and protect federal rights and federal interests", but here we have issues that have already been observed by the U.S. Supreme Court, other circuit courts, and this Court, as matters that are over the line that courts must draw in order to protect "Our Federalism".

Section 157 of title 28 was enacted by Congress as part of BAFJA in response to Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (grant of jurisdiction to bankruptcy court "of all civil proceedings arising under title 11 or arising in or related to cases under title 11" under former Statute 28 U.S.C. §1471, violates Article III of the Constitution). In Northern Pipeline (also known as Marathon) a Chapter 11 debtor commenced a suit seeking damages for alleged breaches of contract and warranty, as well as

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[38] Younger v. Harris, 401 U.S. 37, 44 (1971)

misrepresentation, coercion and duress. Writing for a plurality of the Court, Justice Brennan noted:

> "The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." In contrast, "the liability of one individual to another under the law as defined: is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination..."

It may not be rationally argued that the matters still pending unremoved, in California State Court, even though one Appellee *additionally* made a 'claim' in Mildens' later filed bankruptcy case, were anything but matters wholly involving a dispute of private rights. Still speaking in Northern Pipeline, Justice Brennan observes:

> "The restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not.. Appellant Northern's right to recover contract damages to augment its estate, is 'one

> of private right', that is, of the liability of one individual to another ..." id. 458 U.S. at 71-72

In this case, Appellants' rights to recover non-contract tort damages involving securities fraud, and personal injury tort damages, are *private rights*. There is no effort by Appellants to deprive legitimate creditors their own private rights to that which is properly theirs -- nor has there ever been. To the contrary, resolution of the pending suit in state court has indisputably meant that all legitimate creditors would in fact be paid. This assertion became indisputable when the Trustee obtained the compromise agreements from the false claimant to the Appellants' estate (SOTA), and the other non-claimant parties (Barcott and Robertson Stephens). However, Appellants have contended that the conduct of the proceedings below constituted an extreme violation of their own preserved and constitutionally protected rights to due process because the bankruptcy court and the district court below acted in clear excess of their federal jurisdiction, and circumstantially without any pendent federal jurisdiction.

1. JURISDICTION: DISCUSSED

There are reasonable arguments that support a finding that the bankruptcy court acted in clear absence of any subject matter jurisdiction when entering orders affecting Mildens' pending state court suit. In **Matter of Wood, 825 F.2d 90 (1987)** ("**Wood**"), at 93 and at 97, the Ninth Circuit speaks upon the issue of jurisdiction of its Article I bankruptcy courts relating to proceedings ongoing in a state court forum, as follows:

> "For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish

between proceedings 'arising under', 'arising in a case under', or 'related to a case under', **title 11**."

"These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy. The Act does not define 'related' matters. Courts have articulated various definitions of 'related', but the definition of the Court of appeals for the Third Circuit appears to have the most support: 'Whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.' This definition comports with the legislative history of the statutory predecessor to [28 U.S.C.] **section 1334**. Neither **Marathon** nor general concerns of comity counsel against its use. We adopt it as our own." Id. at 93

"If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be related to the bankruptcy because of its potential effect, but under [28 U.S.C.] **section 157(c)(1)** it is an 'otherwise related' or non-core proceeding." Id. at 97.

"We hold, therefore, that a proceeding is core under [28 U.S.C.] **section 157** if it invokes a substantive right provided by **title 11** or if it is a proceeding that by its nature, could arise only in the context of a bankruptcy case." Id. at 97.

Mildens' matters involve matters that cannot be construed to have 'arisen under' or to have been 'otherwise related to' any provision of title 11 or lawful activity in any case proceeding under **title 11**. Appellants did not depend upon any provision of title 11 to obtain their common law right to a jury trial in California State Court, upon issues arising under California law.

The learned judges of the bankruptcy court and the district court below necessarily knew the above, because the rule of law has long been clear and contrary to all the jurisdictional expressions by the Appellees.

The Second Circuit expressed caution when it determined **In re: Nanodata Computer Corp., 52 B.R. 334 (Bkrtcy. - 2nd Cir. 1985)** ("**Nanodata**"), at 341-42, as to the issue of exclusive versus federal pendent jurisdiction over disputed issues in terms of **28 U.S.C. §157(b)**, as follows:

> "**Subdivision (b)(2)** of **section 157** then contains a non-exclusive, descriptive listing of 'core' proceedings. It is this court's firm conviction that, although drafted in Declaratory form, this subdivision is only descriptive of the types of matters which generally will arise under or arise in a case under **title 11**. That is to say, if a given proceeding is non-core in that it does not arise under or arise in a case under **title 11** and, hence, is only 'related', it does not become 'core' simply because it is technically or arguably within a given [28 U.S.C. §] **(b)(2)** description."
>
> "**Subdivision (c)(1)** permits a bankruptcy court to hear a 'related', non-jury proceeding,

> but in doing so, it acts as little more than a fact-finder. It must forward its proposed findings of facts and conclusions of law to the district court for de novo review. It should be noted that this procedure [absent consent of the parties and district court approval in proceedings governed by (c)(2) and hereinafter discussed] is mandatory for all proceedings which are only 'related to a case under **title 11**,' the bankruptcy court being required in all instances, whether the issue is raised by a party or not, to determine if a proceeding is 'core' or 'non-core'. The non jury limitation, of course, is implicit both in the concepts of bankruptcy court fact-finding and district court de novo review."

A year after the **Nanodata** decision by Second Circuit, the Ninth Circuit in its consideration of **In Re: Castlerock Properties, 781 F.2d 159 (9th Cir. 1986)**, at 162, laid down its central premise later to be foundational in the **Wood** case cited above:

> "[W]e are persuaded that a court should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems..." "... The apparent broad reading that can be given to [28 U.S.C.] **§157(b)(2)** should be tempered by the **Marathon** decision..." (citations deleted)

In **Zweygardt v. Colorado Nat. Bank of Denver, 52 B.R. 229 (Bkrtcy. 1985)**, at 230-31, a 10th Circuit bankruptcy court case describes a rule of law that applies to this case as relates to any effort to use **28 U.S.C. §1452** in order to move from a state court to bankruptcy court, as follows:

"[T]he 'equitable ground' upon which remand should be ordered here is that this court lacks jurisdiction over the state court proceeding, that it is not a core proceeding and is only tangentially related to the bankruptcy case. ... [T]he lack of jurisdiction over a non-core proceeding is a good ground for remand." Id. at 230.

"No question is raised with respect to this court's jurisdiction over the underlying bankruptcy case. A question is raised with respect to this court's jurisdiction over the cause of action present in the instant adversary proceeding. Thus, the threshold determination must be whether this court has jurisdiction over the cause of action." Id. at 230-31.

"Based upon the foregoing argument and discussion, I conclude that the proceedings before me are, at best, related to the underlying bankruptcy case and that the Zweygardts are entitled to have their jury demand honored. This constitutes sufficient equitable ground to require remand of this proceeding, pursuant to the provisions of **28 U.S.C. §1452(b)** to the state district court." Id. at 234-35

Thus, it becomes quite clear that all courts within the federal court system, from the U.S. Supreme Court down to the U.S. bankruptcy courts, are courts fashioned from authority altogether written within the Constitution, and are expressly limited by it, under its express provisions, to those subjects authorized by valid federal law, and to the exclusion of those subjects arising under the common law. These limitations are to

the exclusion of those subjects arising under the common law that do not fall under Congress's implied power to invade contract rights, as derived from the Article I bankruptcy clause. In this case, the actual rights must be determined under California's laws, by California's courts, ***before*** the congressionally created regulation of rights may be invoked. This fundamental step has never taken place.
The effect of any decision entered absent any arguable jurisdiction is that the decision is void, as if it had never been entered.[39]

2. THE CONCEPT OF "OUR FEDERALISM"

According to Associate Justice Sandra Day O'Connor, writing an article printed in *Intergovernmental Perspective*, Summer, 1989:

> "Unlike most other nations of the world, the United States has chosen to administer justice through a dual system of state and federal courts. There is an inevitable tension inherent in our 'indestructible Union of indestructible states.'[40] The balancing of state and federal interest within the federal system is never static; constant and flexible accommodating of the often conflicting interest is required. "
>
> "Any realistic picture of judicial federalism must acknowledge the primary role of the state courts in our federal system of government. ..."

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[39] See Appellants' Brief, pp 12-20.

[40] FERC v. Mississippi, 456 U.S. 742, 777 (1982) (O'Connor, J. dissenting in part), quoting Texas v. White, 7 Wall. 700, 725 (1869).

"Equally important to a fair portrait of the federal system is an acknowledgment of the role played in each judicial system by law from the other system. State law, for instance, plays a significant role in federal court actions ... "

3. THE ROLE OF FEDERAL COURTS IN A SYSTEM OF "OUR FEDERALISM "

Continuing the point expressed above, Justice O'Connor observes,

"... A state court's view on issues of state law is, of course, binding on the federal courts. When the outcome of a state court case could not be changed, even if the federal law issue were resolved differently by the U.S. Supreme Court, the Supreme Court must decline review. The state court judgment in such a case rests on an adequate and independent state ground. The roots of this important jurisdictional limitation are found in the nation's long-standing recognition of the importance of preserving the vitality of both components of our dual federal-state judicial system. State courts have substantial power to grant or withhold jurisdiction to the Supreme Court by the choice of the grounds for the state court decisions."

"... Respect for the integrity of state court proceedings was the explicit basis of Justice Black's important opinion in Younger v. Harris in 1971. In that case, the Supreme Court recognized the 'Long-standing public policy against a federal court interference with state court proceedings ..."[41]

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[41] Younger v. Harris, 401 U.S. 37, id. at 43.

Congress too, has observed the need for comity between the separate jurisdictions co-existing as the governing body of law of our country. This Court is directed to Congress' instructions to the U.S. Supreme Court respecting its grant thereto for the creation of the Bankruptcy Rules, 28 U.S.C. §2075. Congress instructed the U.S. Supreme Court to observe comity with state protections of individual rights by stating: *"Such rules shall not abridge, enlarge, or modify any substantive right."* In this case, the veritable existence of the state court (and the presence of the lawsuit still within that system) has been utterly ignored by everyone except the Appellants, and the protections and immunities extended in respect of all parties individual rights by the Constitution, laws and courts of the State of California, are conspicuously absent from all of the bankruptcy court's expressions.

4. THE ROLE OF THE STATE COURT IN A SYSTEM OF "OUR FEDERALISM"

The deliberations of this Court are most properly *aided* by the state court's interpretations of the Nevada state law issues, apart from the context of the federal bankruptcy action. There is no judicial economy to be served by the bankruptcy court's failure to observe the Bankruptcy Rules, and it utterly ignores the fundamental duty of the state courts of the several states to be the interpreters of the laws arising in their own respective states. Has the separation of powers between the several states and the federal government dissolved so completely? What do other state appellate judges have to say upon the subject?

Judge Dorothy T. Beasley, Court of Appeals of Georgia[42], states:

> "The development of state constitutional law is in no way an affront to the highest court of the land or an effort to deprive it of jurisdiction. Rather, this development complies with the principle of federalism. In addition, the responsible discharge of a state court's duty mandates measurement of the activities of a state's officials, employees, and citizens against the standard they themselves have set up in their organic law." ...
>
> "Judicial review of legislative acts or official actions challenged on state constitutional grounds is a job peculiarly for the state courts." ... "The doctrine of an "adequate and independent state ground" expresses this accommodation of federalism, which delineates the responsibilities of both sets of courts in our dual system of government. Justice Robert Jackson articulated the doctrine in its present language: "This [Supreme] court will not review judgments of state courts that rest on adequate and independent state grounds."[43] ...
>
> "In addition, state court decisions construing state constitutions are an important indication of popular sentiment because democracy is more directly instituted on the state level. Although representatives of the people adopted the U.S. Constitution, the people themselves adopted the state constitutions. As a consequence, the U.S. Supreme Court can profit from state analyses

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42 *Emory Law Journal* 34 (1985): 341

43 Herb v. Pitcairn, 324 U.S. 117, 125 (1945)

> of state constitutional guarantees in construing the corresponding federal provisions." ...
>
> "If state appellate courts do not study, analyze, and apply the state guarantee consistently, how are state trial judges to know the standards that their state constitution requires? ... ' *The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves, respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs -- let us construe and stand by ours.*' "[44]

In pointed argument, the Appellants assert that the essence of the authorities presented above, have specifically challenged all state courts to jealously guard not only their own state's constitutions and laws, but also their court's exclusive domain to interpret them. Justice Randal T. Shepard, Chief Justice of the Indiana Supreme Court, states:

> "Our country's founders believed that the rights of Americans could be secured by creating a federal system full of checks and balances." ...
>
> "The federal system created in 1781 supposes two kinds of dispersion of power. One is the separation of powers between the legislative, judicial, and executive branches.

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[44] Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567 (1855), cited in Abrahamson, "Reincarnation of State Courts," *Southwestern Law Journal* 36 (1982): 951

> The other is between state governments and the national government."[45]

Appellants argue here that the orders entered by the bankruptcy court below affecting the adversary proceedings pending in state court, were nothing more than judicial dicta (utterly unsupported expressions of law) upon unsupportable 'facts' invented in the mind of the federal judges, and with complete disregard for the federal judges' inherent duty to respect the laws under which the issues arose, as well as the state court that maintains jurisdiction over such issues.

Accordingly, Appellants assert that even if they would have ultimately been found to have owed any manner of duty or money to the Appellees by the State court that *does* maintain jurisdiction over this case, it *may not* now be argued that there had *ever been* -- in this case -- any arguable *federal* jurisdiction ever obtained by the U.S. District Court for the Central District of California, to refer to the bankruptcy judge, over the issues still pending a trial in the California State court.

We the People, have constituted the judicial branches of our governments to provide an atmosphere conducive to the efficient determination of actual fact, an environment that shall expeditiously and conveniently allow the parties to present the circumstances created by the facts determined by the finder of fact (in the pending state court case -- the demanded jury) to be then held up to the words of the law.

The intervention by the bankruptcy court below in matters pending in state court *flies in the face* of such honorable and achievable process. It *scorns* the thought

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[45] Shepard, State Constitutions: State Sovereignty, *Intergovernmental Perspective*, Summer 1989, Vol. 15, No 3.

of a just resolution of the issues presented in Mildens' state court action. It denies a demanded jury its opportunity to function as originally intended in the process of application of society's law, society's ethics, and society's indignation, to the offenses that the Appellants allege have been committed by the other parties. Lastly, Appellants would be deprived of their fair opportunity to vindicate their personal reputation and repair the financial damages imposed by the vexatious string of litigation initiated by the Appellees arguing so vigorously that they "won" by paying the estate $120,000.00.

Accordingly this Court should set aside the bankruptcy court's judgment upon the issues still pending in the unremoved state court suit. It should do so upon the insistence of the law that a court has necessarily *abused its discretionary authority*, if it should deprive a party its opportunity to lay its case before the jury it demanded, as an exercise of its *inviolate right*. This inviolate right is availed to all those seeking their ends within the federal courts -- Ref: **28 U.S.C. §1411**[46], **Rule 38 F.R.Civ.P.**, and U.S. Constitution, Seventh Amendment.

Appellants are entitled to their "day in court", and Appellants plea to this Court to deliver to them their constitutionally protected right to a jury trial of the state law merits of his case still pending in California State Court. Appellants are constitutionally entitled to have the entire record of proceedings below swept away.

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[46] 28 U.S.C. §1411. Jury trials (a) except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to a trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." (emphasis added).

For the reasons and authorities presented above, coupled with those which they presented in their opening brief, Appellants have adequately refuted any argument presented in support of either bankruptcy court or district court jurisdiction over the issues currently pending in California State Court.

Wherefore, it is now clear under our "supreme law of the land" that California law is controlling upon the issues pending in California State Court, and the meaning of California law to these issues is yet to be determined by the California Courts. Examination of that "law" is presented below, in ***direct contradiction*** to the orders appealed from in this appeal, and the theory that Personal Injury fails to include personal defamation, personal libel, personal slander, personal emotional distress, and damages generally to the personal character and reputations of private persons -- even those "voluntarily" seeking federal protections under Chapter 11 of title 11.

IV. Structure of California Law -- Generally.

The Organic Law in the state of California is altogether written within the provisions of the Constitution of the State.[47] Other written laws are denominated statutes.[48] The written law of this State is therefore contained in its Constitution and statutes, and in the Constitution and statutes of the United States.[49]

Unwritten law is the law not promulgated and recorded, but which is, nevertheless, observed and administered

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[47] See C.C.P. §1897, "The organic law is the Constitution of Government, and is altogether written." (Enacted 1872) (emphasis added)

[48] See C.C.P. §1897. (Enacted 1872)

[49] See C.C.P. §1897. (Enacted 1872)

in the Courts of the country. It has no certain repository, but is collected from the reports of the decisions of the Courts, and the treatises of learned men.[50] Although the unwritten law may lend great clarity and texture to the organic and written laws of the State, where there is a conflict between the meaning of the written law and case law authority within the context of issues at bar, the effect of other judicial orders of a Court or Judge of this State, or of the United States, create only a ***disputable presumption***, relating to the matter directly determined.[51] In this case, the Appellants' dispute centers upon the meaning of the written statutory words, and written words of the Constitution of the State of California that operate in concert against the suggested meaning of C.C.P. §704.140, as presented by the Appellees.[52]

The organic law, and the statutes, express the will of the supreme power of the State of California.[53] The common law of England, so far as it is not repugnant to or inconsistent with the California Constitution, or the Constitution of the United States, is the rule of decision in all the California Courts.[54]

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50 See C.C.P. §1899. (Enacted 1872)

51 See C.C.P. §1909. (Enacted 1872)

52 See Civil Code §22. Law Defined, "Law is a solemn expression of the will of the supreme power of the State." (Added by Stats 1951, c. 655, §1)

53 See Civil Code §22.1, supra.

54 See Civil Code §22.2, supra.

V. Construction of the Controlling Law.

The words and phrases of the organic and otherwise written controlling law of the State of California are to be construed according to the context and the approved usage of the language (except technical words and phrases that may have acquired a peculiar and appropriate meaning in law, or are separately defined in the law itself).[55]

The term "property" is defined by Civil Code §14 to include property that is "real" and "personal". The words "real property" are coextensive with lands, tenements, and hereditaments.[56] The words "personal property" include money, goods, chattels, things in action, and evidences of debt.[57] Every person has, subject to the specific provisions of law, the "personal rights" of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations. It is within the realm of these "personal rights" that Appellants have sought the protections and immunities of the laws of the State of California. Appellees have sought to remove the protections of California's laws from the persons of the Appellants. Neither the Appellees, nor the federal courts, are permitted by the powers of the U.S. Constitution to perpetrate such an act. Article VI of the U.S. Constitution relies upon the "judges of the several states" to ascertain the constitutional conformity of state law to the U.S. Constitution.

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55 See Civil Code. §13 (Enacted 1872)

56 See Civil Code §14, 2. (Enacted 1872, Amended Code Am. 1873-74, c. 612, §1; Stats. 1903, c. 281, §1.)

57 See Civil Code §14, 3. (Enacted 1872, as above.)

1. Relevance to Appellants' Personal Injury Tort case.

Although the Appellants' "personal property" includes "things in action", proper application of C.C.P. §703.140, **Federal bankruptcy; applicable exemptions,** in conjunction with C.C.P. §704.140, **Personal injury causes of action, damages or settlement; exemption; ...**, function to supersede any federal discretionary claim by a bankruptcy trustee or the federal bankruptcy court upon such "things in action" as "property of the estate", in terms of 11 U.S.C. §541. Furthermore, Appellants' "personal rights" to be protected in terms of their persons from the "personal insult", "defamation", and from "injury to ... personal relations", all of which constitute the substance of Appellants' Personal Injury Tort cause in action. The Appellees have presented absolutely no authority in their arguments that outweigh the Appellants' statutory argument under the written laws of the State of California.

Wherefore, the bankruptcy court and the district court have made a clear error under supreme and controlling California Organic and Statutory Law, when they allowed their courts to intervene in a Personal Injury Tort cause in action to the detriment of the actual persons suffering the injury.

VI. Ancillary Issues.

1. Appellees' re-statement of Appellants' case is utterly disputed.

Appellees' have attempted to overcome the merits of an unlitigated case in the State trial court by variously attacking the integrity of the Appellants without the benefit of the jury trial demanded by the Appellants. The very essence of the Appellants' Personal Injury Tort cause in action arises under the laws governing personal rights of individuals that existed prior to the

ratification of California's first Constitution (1849), and its inclusion into the Union (1850). Wherefore, Cal Const, Art I §16, supra, has been interpreted as preserving to litigants the right to trial by jury as it existed then.[58] Appellees' general arguments that such a jury demand was in any manner waived upon Appellants' filing of their voluntary bankruptcy petition under Chapter 11, is utterly frivolous.

Bankruptcy courts do not conduct jury trials, but district courts do. Nevertheless, personal injury tort claims are only to be heard by the federal district court -- if and when a pending state court case is properly removed to federal jurisdiction. The Seventh Amendment of the U.S. Constitution commands the district court to conduct a jury trial under such circumstances. However, this case remained pending in the California Superior Court. As such, the issues (all of which arise strictly under state law, and none of which rely upon any consideration of federal law in general, and certainly do not rely upon any aspect of title 11) were never properly brought before the consideration of the bankruptcy court, or to the district court from which the bankruptcy court obtains its powers to function as a court.

There is a federal statutory means by which a defendant in a lawsuit pending in a state court may bring the case to federal district court for trial, but the Appellees' did not follow that federal statute, nor the Rules governing the procedures relating to that federal statute.

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[58] See Dorsey v. Barba, 38 Cal 2d 821, 827-828, 59 Cal Rptr 276, 427 P2d 988 (1952)

2. Power of bankruptcy court to approve a disputed compromise.

The Appellees, and the lower federal courts, have repeatedly claimed that the authority for the compromises rests upon this Courts determinations in **In Re: A&C Properties, 784 F.2d 994, 1377 (9th Cir. 1986)** ("A&C"),[59] but this Court knows that important distinguishing circumstances set its decision in that case apart from this one.

First, the agreement in A&C was between the trustee and the debtor, for whose exclusive benefit the federal protections of federal bankruptcy law exist.

Second, as such, there can be no arguable challenge that the A&C bankruptcy court had both subject matter jurisdiction, and that the matters were "core" bankruptcy administration issues, since the compromise agreeably served the debtors private interests, in keeping with public policy.

Third, being possessed of jurisdiction, the bankruptcy judge was allowed under law to opine upon the matters presented to him, and obtained considerable discretion in the exercise of his judicial powers.

Fourth, the bankruptcy court was making its "fair and equitable" determinations pursuant to approval of a plan for reorganization under a non-Chapter 7 liquidation case, and there was no clear and convincing evidence that the compromise denied the "protected" debtor its full opportunity to vindicate its reputation and repair personal damages -- there were no personal damages because the debtor was not a person.

As shown above, and variously admitted by the Appellees, none of those circumstances pertain to the issues still pending in State Court, and which issues are

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[59] See Appellees': Joseph at pages 2, 8, 9, 10; Barcott at pages 2 and 8; Robertson Stephens at pages 1 and 8.

the essence of all the appealed from orders upon appeal here. Under the due process issues raised in this appeal, the bankruptcy court and the district court in *this* case have each abused their judicial discretion by allowing themselves to intervene into matters wholly resting in a state court forum, completely apart from even pendent federal jurisdiction in this case, and furthermore basing their decisions upon arbitrary and capricious concepts of fact and controlling law that were determined from afar.

3. Emotional distress claim as Property of the Bankruptcy Estate.

Each of the four Appellees have vehemently asserted to the courts below, and now to this Court that the emotional distress as property of the bankruptcy estate dispute here, was settled by this Court in **Sierra Switchboard v. Westinghouse Electric Corp., 789 f.2d 705, 707 (9th Cir. 1986)** ("Sierra").[60] In actual fact, this Court appropriately reserved as an exception to its Sierra rule all those cases where "... injuries to the person of the bankrupt ... shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process ....", referring to **United States v. Whiting Pools, Inc., 462 U.S. 198, 205 &n.9; 103 S.C. 2309, 2313 & n.9; 76 L.Ed.2d 515 (1983).** Under California law, such manners of personal injuries as relate generally to defamation, including libel and slander, are automatically exempted from attachment, etc., (see discussion upon standing California Organic and Statutory law, above).

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[60] See Barcott at page 9; SOTA at pages 19 and 20; Joseph at page 18; and, Robertson Stephens at page 8.

However, this Court went on in Sierra to frame the estate property issue in terms of its consideration of the "Bankruptcy Reform Act of 1978". Given the historic determination upon the overbroad congressional grant of Congress, as determined in **Northern Pipeline Construction v. Marathon Pipe Line Co., 458 U.S. 50** (Marathon), this Court's apparent disregard of Congress's propensity to grant to federal courts powers it does not have seems curious. In n. 3, this Court excused itself from deciding whether *"... emotional distress might in some circumstances be so personal to the debtor that it would be undesirable, on public policy grounds, to transfer the property interest to the bankruptcy trustee."* The Sierra Court then remarked that *"... debtor cited no public policy reason why Congress could not expand [the] definition of property to include personal injury claim ...."* (See n.3), and that in Sierra, it perceived *"... no persuasive public policy rationale."* (See n.3)

Now, this Court should pay much closer attention to its role in governance. ***We the People*** did not constitute, by words or by inference, any authority to a federal government, to in any manner ever deprive us of our right to vindicate our assailed personal and private character in a court of law before a demanded jury. All of that which is declared in our Constitution supports our collective right to the official provision of such ends, and to what ever extent federal courts may find jurisdiction to determine or "protect" private property, that which is part of a citizens "person" remains part of his or her person after the federal judicial proceeding is over.

No part of a man's person is chattel.

His reputation is not chattel.

His emotional well being under circumstances governed by state law is not chattel.

He is as protected by the Thirteenth Amendment as any other citizen in our society, and this Court and all the federal courts in this Nation are imposed upon by Article III and Article I, to respect the sanctity and privacy of all citizens -- even debtors under title 11. Debtors are ***not*** slaves.

To whatever extent this and other federal courts actually recognize their duty to avail the "protections" of title 11 to provide the debtor a "fresh start", no part of that process is allowable -- under the First Amendment restriction upon Congress to refrain from writing laws limiting a man's Right to Redress; the Fifth Amendment Rights to due process protections of his Life, his Liberty, and his Property; and his Seventh Amendment *inviolate*[61] right to a jury trial upon his demand for same -- to subvert his veritable person. To hold to the contrary would be to invite a resurgence of dueling to obtain redress for damaged honor not allowed to be redressed in court.

Ordinary people take their reputations and their honor just as seriously as federal judges. Even with no remaining property, a man's honor in tact is enough to make his just "fresh start". But without it, his person is doomed. Not this Court, nor the bankruptcy court, nor the district court, have the authority under our present Constitution to even come near to obstructing a person's pursuit of vindication in a proper forum. That is this Court's "public purpose" to be served. This Court is respectfully charged by our Constitution to properly serve that purpose.

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[61] Inviolate- intact; not violated; free from substantial impairmant. Com. v. Almeida, 362 Pa.. 596, 68 A.2d 595. Black's Law Dictionary, 5ed. (West Publishing, 1891-1979), p742.

3. Appellants have now and have always had proper standing in this case.

Notwithstanding the Appellees' multiple arguments to the contrary, for the reasons stated above relating to the exceptions provisions of Personal Injury Tort causes in action, and furthermore upon the principle that a debtor in any case under title 11 always maintains standing as a party in interest as to actions involving its estate, the Appellees' contentions challenging Appellants' standing to bring their Rule 60(b)(4) voidness argument against the order converting their Chapter 11 case to Chapter 7 liquidation, is without factual or legal merit.

4. Appellants have not now or ever knowingly or unknowingly waived their right to a jury trial.

Contrary to the argument of the Appellees, from their first objections to the compromises brought forth on this appeal, the Appellants have always asserted their demand for a jury trial. This demand has been stated and restated by the Appellants in multiple briefs and oral argument before the bankruptcy court and through their appeal to the district court. (See Appellants Excerpt of Record at 8-9, 104-105,158-160, Appellants Supplemental Excerpt of Record at 1-3, 6-7). The U.S. Supreme Court found **Miranda v. Arizona, 384 U.S. 436 (1966)** that alleged criminals can not unknowingly waive their Constitutional rights (the right to protection against self incrimination). Certainly, ordinary law abiding citizens (and victims of an alleged fraud) seeking the protection of Title 11 of the U.S.C. should not be afforded any less Constitutional due process protections than alleged criminals. The due process clause of the Constitution requires that the Appellants should have been warned if they were waving their Constitutional right to a jury trial (as alleged by the

bankruptcy judge) before the commencement of their bankruptcy.

IV Conclusion

The bankruptcy judge abused his discretion and erred when he told the Appellants that they waived their Constitutional right to a jury trial when they entered his court (Appellants' Supplemental Excerpt of Record at 3-4). The bankruptcy judge erred when, without giving the Appellants an opportunity to dismiss their Chapter 11, punitively converted their solvent estate's voluntary Chapter 11 Reorganization to an involuntary Chapter 7 Liquidation, on a motion brought by the U.S. Trustee under Local Bankruptcy Rule 1112(b) which was joined by two parties without proper standing as required by 11 U.S.C. §303(b)(1) (See Appellants' Opening Brief at 17-18). After the conversion, the bankruptcy judge then systematically dismantled the Appellants' pending State Court cases against the Appellees for the sole benefit of the Appellees and to the determent of the Appellant Debtors and their lawful Creditors. Other issues consolidated on this Appeal address the manner in which the bankruptcy court went about its dismantling of the Appellants' pending State Court case and claims against the Appellees. The bankruptcy judge erred when he ruled that the Appellants had no personal injury claims without subject matter jurisdiction pursuant to 11 U.S.C 157(b)(5) The bankruptcy judge erred when he ordered the turnover of property after an unlawful conversion. The bankruptcy judge erred when he approved compromises of pending State Court law suits which included exempt personal injury claims. The bankruptcy judge erred when he allowed a trustee to release the claims of a non-party, (In Communications, Inc.) to the bankruptcy against the Appellees. The district court judge abused his

discretion and erred when he affirmed the orders of the bankruptcy judge brought to him on appeal.
For the reasons contained in Appellants' opening brief, and for the further developments of those arguments against the assertions and sophistry of the Appellees in their various responding briefs, this Court should approach its strictly federal appellate jurisdiction in terms of the respect and cautions expressed in its own prior decisions and by the above cited Justices of the U.S. Supreme Court. The Constitutional, Statutory, and the Common Law protections of citizens of California and these United States are the essential objects of protection by the California courts and this federal court. This Court pursuant to **Rule 60(b)(4) F.R.Civ.P** should reverse the bankruptcy court's unlawful conversion of the Appellants' bankruptcy from a Chapter 11 to Chapter 7 and thereby void all subsequent orders issued under Chapter 7. This would preserve the Appellants' *inviolate* Constitutional rights and restore the Appellants' estate affording the Appellants the protections of Chapter 11 Reorganization as Congress had intended.

Respectfully submitted this 17th day of July, 1995,

Charles G. Milden,
pro per

Susan P. Milden,
pro per

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)	Case No. SA91-40157JR
	)	
CHARLES G. &	)	Santa Ana, California
SUSAN P. MILDEN	)	Thursday, March 18, 1993
	)	3:00 P.M.
Debtors.	)	
	)	Chapter 7

Hearing on trustee's motion for order approving compromise of controversy

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1985, State of the Art indicated that Chuck Milden had a nervous breakdown; Chuck Milden is suicidal and unstable; Chuck Milden is crazy. Your Honor, I am only crazy about having my Constitutional rights to life; liberty, and happiness preserved and the ability to contract in the period and the ability to gain employment. It's a Constitutional right that I believe should be protected by this Court. And I would request that the other causes of action be allowed to go to trial in the state court. Thank you, Your Honor.

THE COURT: Okay.

MR. SIEGEL: Your Honor, may I be heard?

THE COURT: I'm not going to reopen this whole thing. Okay?

MR. SIEGEL: Okay. I just want to make --

MS. MILDEN: Your --

THE COURT: No, Ms. Milden. What you need to understand is when you come into the Bankruptcy Court, under the law, you give up your right to a jury trial with respect to the claims that you have against other entities. You made the voluntary decision to come into this court. Congress and statutes and judicial determinations based upon those statutes over the years have held that a debtor does not have a jury right, a jury trial right, with respect to the debtor's cause of action.

Now, the reason for that is you come into the Bankruptcy Court for a quick resolution in terms of your

assets and liabilities. On the asset side, by coming into bankruptcy, you are pledging all of those assets to your creditors, subject to the distribution provisions of the Bankruptcy Code. If we had to try by jury all the rights that a debtor might have with respect to individuals, we wouldn't get through one-tenth of the cases that we have to deal with in -- bankruptcy nationally now at the rate of 950,000, and in this district last year 95,000 cases. If you think that the Bankruptcy judges of this district can take the time to try claims the debtors might have against entities by jury, it just wouldn't work. So Congress know that and set it up this way. And the courts, the Supreme Court on down, have enforced that. so your Constitutional right to a jury trial was waived when you came into this Bankruptcy Court.

This Court is responsible for seeing that the assets, your assets, are liquidated fairly and that there is a distribution of those assets to the creditors in accordance with the provisions of the Bankruptcy Code. that's what I hope will happen. I am faced here with the difficult task of determining whether or not the proposal made by the trustee, which involves multiple cause of action that you have, is a reasonable course of action in connection with the administration of this estate.

After spending -- after hearing argument and having reviewed a lot of papers and testimony by declaration and over three hearing, I have decided that, in accordance with the law,

the proposal by the trustee is not unreasonable for this estate. I understand that is has substantial ramifications for you individually, but that's the law as I understand it.

MR. THOMPSON: You Honor, may I make --

THE COURT: Now, in terms of your personal situation, you may view yourself as coming out of this a loser. What has happened is that SOTA is paying $125,000 to resolve these cause of action against you. And if anyone out there views that as a loss, I think they're not looking at the situation the way they should.

You have, in my view, my personal view, some justification for what you asserted in light of the resolution of these causes of action at a fairly significant sum to this estate, and you ought to be able to us e that effectively to argue to anyone who would face you that, you know, you have been vindicated.

Now, as to what actually happened in reality is the situation, I do not know because I haven't heard all the testimony and reviewed everything that took place between you and SOTA. I'm not asked to do that here today. I'm asked to make a determination as to whether or not this is a fair resolution of these causes of action. 95 percent of causes of action that are asserted in the courts are resolved by settlement. I f they were not, again, we've have a tremendous log jam in terms of trying to resolve difficulties between people and entities.

I think this is a reasonable settlement, as I've said, so the settlement is approved.

MR. SIEGEL: Does that include TA, Your Honor?

THE COURT: That is also approved as to TA.

MR. SIEGEL: Thank you, Your Honor.

MR. CASEY: Your Honor, may I -- I'd like to make one procedural inquiry. Would it be agreeable with this Court if the trustee was to draft an order with the findings of fact? I realize it's unusual on a motion --

THE COURT: Yes, you can do that.

MR. CASEY: Thank you, Your Honor.

MR. MONROE: Thank you, Your honor.

MR. HORNAK: Thank you very much, your Honor.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

---oOo---

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter

/s/
Michelle Spain, Transcriber

October 20, 1993

(2)

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-334

In The

Supreme Court of the United States

October Term, 1996

CHARLES G. MILDEN and SUSAN P. MILDEN,

Petitioners,

vs.

JAMES J. JOSEPH, Chapter 7 Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Despite the allegations of plaintiffs, the following are the actual questions, with regard to this real party in interest, Frank A. Barcott, an individual, dba, Frank A. Barcott Security and Investigation ("Barcott"), presented by this Petition:

1. Whether Petitioners may argue that the underlying bankruptcy was wrongfully converted to a Chapter 7 proceeding when they did not timely appeal from the conversion order?

2. Whether the bankruptcy and district courts had jurisdiction to approve the trustee's settlement of the estate's state court lawsuit?

LIST OF PARTIES

Charles G. Milden and Susan P. Milden, Petitioners, are Chapter 7 debtors.

James J. Joseph is the trustee of the Chapter 7 Milden Estate.

State of the Art, Inc. is a creditor of the Milden estate.

David S. Samuels, George Riviere and David W. Hanna are officers of State of the Art, Inc.

Robertson, Stephens & Co., is related to the State of the Art issues.

TA Associates is related to the State of the Art issues.

Frank A. Barcott, an individual, dba Frank A. Barcott Security and Investigations is one of the defendants in the state court action that was settled with the Chapter 7 Trustee in Bankruptcy.

Walter Dellinger, Solicitor General of the United States

United States of America, Office of the United States Trustee.

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INTRODUCTION

Petitioners' purported grounds for hearing, when seen through the rhetoric, are merely disagreements with the Courts' rulings. Petitioners would have their cake and eat it too, *to wit*, enjoy the benefits of Chapter 7 bankruptcy, but not the downside of the loss of personal assets. The orders of the bankruptcy court, which have been upheld by the district court, and the Ninth Circuit court, are all soundly based on statutes enacted under Article I of the United States Constitution, as well as the facts and evidence before those courts.

The settled and dismissed lawsuit filed in the Superior Court for the State of California for the County of Orange was never a "personal injury" case. The Ninth Circuit specifically confirmed that it was a claim for emotional distress, and was the property of the bankruptcy estate. There was no claim by Petitioners in the state court action for physical injury, nor was there a claim that the settlement proceeds were necessary for the support of Petitioners. (Appendix to Petition, p. 11)

The state court action was commenced when State of the Art, Inc. ("SOTA") filed suit against Charles Milden almost seven years ago. The Mildens in turn sued SOTA, Barcott and two other defendants in March 1991. The two actions were consolidated. Four causes of action were alleged against Barcott: intentional and negligent infliction of emotional distress, negligence and defamation. Appellants' Excerpts of Record in Ninth Circuit appeal ("E.R.") at p. 194, n.1.

Seven months later, the Mildens filed Chapter 11 bankruptcy. In October 1992 the bankruptcy court granted the United States Trustee's motion to convert the case to a liquidation proceeding under Chapter 7. Appellees' Joint Supplemental Excerpts of Record in Ninth Circuit appeal ("S.E.R.") at Ex. 6. Petitioners did not timely appeal that order.

When trustee Ronald Clear was appointed to liquidate the bankruptcy estate, the state lawsuit became the property of the estate and Clear appeared and began litigating the case as the real party in interest. James J. Joseph was subsequently appointed successor trustee. By April 1993, Joseph and Clear settled with all of the defendants including Barcott. The January 1994 trial was taken off calendar and the superior court dismissed the case. Barcott has, since that time, been burdened with obsessive plaintiffs who will not let the case die.

REASONS FOR DENYING THE WRIT

I.

THE BANKRUPTCY AND DISTRICT COURTS PROPERLY APPROVED AND AFFIRMED THE BARCOTT SETTLEMENT.

Petitioners attack the Barcott settlement (item 2 on p. 4 of the Petition). The bankruptcy court approved each of the four defendants' settlements after several hearings. S.E.R. at Exs. 12 and 23. The district court affirmed these rulings on appeal and set forth its decisions in two comprehensive factual and legal analyses. E.R. at pp. 74-83 and 193-201.

Petitioners claim that the bankruptcy and district courts issued orders in excess of their jurisdiction. Petitioners base this claim on the following three incorrect legal contentions:

(1) Under the Tenth Amendment, state law preempts conflicting federal law with respect to state "property rights"

(2) The lower courts violated Petitioners' rights to due process by committing a Fifth Amendment taking of their property and,

(3) The lower courts wrongfully approved the settlements of a "personal injury" lawsuit.

Barcott will address each of these contentions in turn.

A. Preemption Issue

Petitioners contend that under the Tenth Amendment to the Constitution, state law must prevail over federal bankruptcy law with respect to "private property" in the form of state court lawsuits. However, their argument ignores the doctrine of preemption and must fail.

The Tenth Amendment provides that powers not otherwise delegated in the Constitution are reserved to the states or to the people. However, Article I, § 8 of the Constitution grants to Congress the power to establish uniform laws on the subject of bankruptcies. Article VI, the supremacy clause, makes federal laws the supreme law of the land. Thus Congress had clear authority to establish federal bankruptcy law which preempts conflicting state laws, if any.

Under both federal and state law, in a Chapter 7 liquidation proceeding, a debtor's lawsuits, state or federal, become property of the bankruptcy estate and are subject to a trustee's exclusive control. 11 U.S.C. § 541(a)(1) and *People v. Kings Point Corp.*, 188 Cal. App. 3d 544, 549 (1986). Thus state and federal law agree and do not conflict.

Under both federal and state law, California courts did not retain exclusive jurisdiction over the lawsuit but it became part of the estate upon Petitioners filing bankruptcy. *Id.* Further, even if there were a conflict in law, federal bankruptcy law would prevail in any event. For these reasons, Petitioners' Tenth Amendment argument lacks merit.

B. Due Process Issue

Petitioners' Fifth Amendment due process argument is that, by their orders, the lower courts deprived Petitioners of property. Specifically, they allege that they are entitled to retain the value of their estate in excess of that owed to their creditors and claim a taking occurred of the difference between what Petitioners believe their causes of action were worth and the amounts the trustee settled them for. However, as the district court correctly noted, the causes of action are estate property, not Petitioners, and so the challenged orders pertain to property that is not theirs.

The trustee's statutory duty is to liquidate the estate as quickly as possible for the benefit of creditors, not for the benefit of the debtors. The trustee had no duty to see to it that Petitioners have money left over once all the creditors are paid. As was found to be the case here, the trustee merely had to use reasonable judgment in settling the case within the range of reasonableness, considering pertinent factors such as the risk of litigation and the costs of ultimate recovery. *In re A & C Properties*, 784 F.2d at 1381. As such, Petitioners suffered no taking.

With respect to procedural due process, the record reflects that throughout the pendency of the underlying motions, orders and appeals, Petitioners have been indulged by the courts more than was warranted given their pro se status. Several hearings were held on the various issues. Clearly Petitioners were given notice and a chance to be heard at every turn. There is simply no evidence that Petitioners suffered any sort of due process violation.

C. Personal Injury Issue

Petitioners argue that the court erred in approving the settlement because the causes of action were for "personal

injury" and that a trial in district court was required under 28 U.S.C. § 157. This is incorrect both legally and under the facts of this case. E.R. at pp. 197-201.

All causes of action, whether for personal injury or not, are property of a bankruptcy estate by operation of law. 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc.*, 103 S. Ct. 2309, 2313 n.9, 462 U.S. 198, 205 n.9 (1983); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986); and *Bronner v. Gill*, 135 B.R. 645, 647 (9th Cir. BAP 1992). They remain property of the estate, subject to the trustee's administration and control, unless they are abandoned or exempted, neither of which occurred in this case. Because the causes of action here are and always have been property of the estate, it was up to the trustee to settle or try the case and here he elected to settle.

Upon reaching each of the settlements of this case, the trustee properly sought and obtained bankruptcy court approval. The bankruptcy court in turn properly supervised the trustee's administration of this estate asset in hearing the trustee's motions for orders approving the various compromises (*i.e.*, settlements) as core proceedings within its statutory jurisdiction as provided in 28 U.S.C. § 157(b)(1). The hearings on the trustee's motions concerning the settlements were not "trials" of the case.

Thus, Petitioners' argument that under 28 U.S.C. § 157(b)(5) a trial in district court was required is untenable. The causes of action have been affirmatively found to involve no "personal injury" within the meaning of this statute and the trustee settled the case and so no trial was required.

II.

"PERSONAL INJURY" EXEMPTION CLAIM (ITEM 6 ON P. 4 OF PETITIONERS' PETITION).

Petitioners take issue with the bankruptcy court order sustaining the trustee's objections to the amended exemption claims made pursuant to California Code of Civil Procedure § 704.140. By that amended claim, Petitioners sought to exempt the Barcott and SOTA settlement proceeds and/or the causes of action alleged against them by claiming that their emotional distress and defamation causes of action were claims for personal injury. S.E.R. at Ex. 16. The bankruptcy court sustained the trustee's objections on this issue. S.E.R. at Ex. 21. The district court on appeal found no basis for disagreeing with the bankruptcy court's ruling that none of the Petitioners' claims involved bodily injury. S.E.R. at pp. 200-201.

III.

PETITIONERS DID NOT TIMELY APPEAL THE CHAPTER 7 CONVERSION ORDER AND SO CANNOT OBJECT TO IT NOW (ITEM 1 ON P. 4 OF THE PETITION).

The bankruptcy court granted the United States Trustee's motion to convert the case to a Chapter 7 proceeding and entered its order to that effect in October 1992. S.E.R. at Ex. 6. A Chapter 7 conversion order is final for the purposes of appeal because it substantially affects the debtor's property rights. *In re Reberor*, 89 B.R. 314, 321 (N.D.N.Y. 1988). With this, Petitioners agreed in their opening brief to the Ninth Circuit (p. 21). No notice of appeal concerning the conversion order was ever filed.

Under Fed. R. Bankr. Proc. 8001(a) and 8002(a) Petitioners

had ten days from the entry of the conversion order to file a notice of appeal. They did not do so. Petitioners are not entitled to this type of relief because the requirement that a timely notice of appeal be filed is jurisdictional. *In re Souza*, 795 F.2d 855, 857 (9th Cir. 1986). As such, all sections of the petition which address or relate to the Chapter 7 conversion of the bankruptcy estate must be disregarded as irrelevant.

CONCLUSION

Based on the foregoing, the bankruptcy, district court, and Ninth Circuit rulings concerning the Barcott settlement and the sustaining of the trustee's objections to the Petitioners' personal injury exemption claims were proper. There is no showing of abuse of discretion or misapplication of the law. Rather, the lower courts rendered comprehensive and accurate assessments of this case and proper legal rulings after consideration of all pertinent evidence before them. The petition should be denied.

Respectfully submitted,

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No. 97-334

In The

Supreme Court of the United States

October Term, 1996

CHARLES GEORGE MILDEN and SUSAN PATRICIA MILDEN,

Petitioners,

vs.

JAMES J. JOSEPH, Chapter 7 Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Although argued in terms of constitutional violations, Petitioners' primary complaint is that the bankruptcy court did not rule in their favor. The following are the actual questions presented by this Petition:

1. Does the federal district court, the court of appeals, or this Court have jurisdiction to entertain the merits of Petitioners' appeal from the bankruptcy court's order converting their case from chapter 11 to chapter 7, where Petitioners failed to file a notice of appeal from that order?

2. Did the bankruptcy court have subject matter jurisdiction to approve a settlement of a state court action filed pre-petition by Petitioners?

3. Did the bankruptcy court have subject matter jurisdiction to approve the Trustee's use of the stock of a corporation, wholly owned by Petitioners pre-petition, to effect a release of the corporation's claims against third parties?

LIST OF PARTIES

Respondents have no parent companies or non-wholly owned subsidiaries.

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INTRODUCTION

Petitioners attempt to invoke weighty constitutional concerns as grounds for consideration of their Petition for Writ of Certiorari. Petitioners assert that the result of this case impacts the underpinnings of our system of law and basic fundamental rights. The record below demonstrates, however, Petitioners' failure to meet any of the grounds stated in Rule 10 of the Supreme Court for this Court's discretionary review.

The extreme rhetoric of the Petition masks Petitioners' primary complaint: their basic dissatisfaction with the bankruptcy court's rulings. Unfortunately for Petitioners, the challenged orders of the bankruptcy court find clear textual support in the statutory scheme enacted by Congress pursuant to an expressly enumerated power in Article I of the United States Constitution, as well as in the factual record. As a result, both the district court and the Ninth Circuit Court of Appeals reviewed and affirmed on appeal the bankruptcy court's actions in: (1) converting Petitioners' case from chapter 11 to chapter 7; (2) approving the estate's settlement of Petitioners' pre-petition state court claims; and (3) approving the trustee's use of Petitioners' stock, acquired pre-petition, to effect a release of claims.

As the record below amply reflects, Petitioners' plight is of their own making. Rather than face the jury they now claim to demand, Petitioners voluntarily chose to initiate this bankruptcy proceeding. Rather than comply with the requirements expected of all honest debtors, Petitioners repeatedly chose to disregard them. Denied the ability to manipulate the bankruptcy process to their own ends, Petitioners now pursue a legal crusade against imagined antagonists, refusing even to concede the legitimate jurisdiction of the bankruptcy and district courts over property of a debtor's estate.

Petitioners' mere dissatisfaction with the consequences of their own conduct gives rise to no constitutional issues and fails to amount to an infringement of their due process rights. The bankruptcy court decided this case in a wholly proper fashion, consistent with Petitioners' constitutional rights. This Court should deny the Petition.

STATEMENT OF THE CASE

Petitioners paint this case as one involving numerous and substantial deprivations of their constitutionally guaranteed rights. In an effort to bolster this claim, Petitioners present a confused and tortured description of the procedural history of this case. Petitioners' description is replete with inaccuracies and matters not reflected in the record on appeal to the United States Court of Appeals for the Ninth Circuit. Although lengthy, the actual procedural history is much simpler than Petitioners acknowledge. More importantly, the record demonstrates that the bankruptcy court entered every challenged order in conformity with established statutory authority, and that Petitioners have presented no justification for this Court to exercise its discretionary review.

A. Proceedings In The Superior Court.

On December 31, 1990, Respondent State of the Art, Inc. filed a complaint in the Superior Court of the State of California for the County of Orange against Petitioner Charles Milden. That complaint sought damages and injunctive relief for, *inter alia*, breach of contract and misappropriation of trade secrets. On March 4, 1991, Petitioners filed a separate action against Respondents State of the Art, David S. Samuels, George Riviere, David W. Hanna (collectively "SOTA"), Robertson Stephens and Company, L.L.C. ("RSC") and other named defendants. Petitioners sought damages for, *inter alia*, intentional and

negligent infliction of emotional distress, and rescission of State of the Art's prior repurchase of Milden's State of the Art stock (the "Pre-Petition Claims").

B. Proceedings In The Bankruptcy Court.

1. Filing and Conversion.

On October 24, 1991, approximately two months before the scheduled trial of State of the Art's lawsuit against Mr. Milden, Petitioners filed a chapter 11 petition in the United States Bankruptcy Court for the Central District of California. Petitioners' original schedules failed to designate their Pre-Petition Claims as assets exempt from administration.

On three occasions over the course of the next year, the Office of the United States trustee moved to dismiss or convert Petitioners' chapter 11 case due to, *inter alia*, Petitioners' failure to comply with the reporting requirements established for all chapter 11 debtors. On October 8, 1992, the bankruptcy court granted the United States trustee's third motion, and converted Petitioners' bankruptcy case from chapter 11 to chapter 7. The court appointed a trustee (the "Trustee") to liquidate Petitioners' estate (the "Estate").

Petitioners moved for reconsideration of the conversion order. On November 10, 1992, the bankruptcy court denied Petitioners' Motion. Petitioners failed to file any notice of appeal from the order converting their chapter 11 case.

Petitioners assert that the bankruptcy court converted their chapter 11 case "two weeks" prior to the hearing on confirmation of Petitioners' plan of reorganization. (Petition, p. 8.) Petitioners seriously misstate the record. Petitioners failed to even obtain court approval of a disclosure statement (the first step in plan

confirmation), let alone circulate a plan of reorganization to creditors for voting. The hearing presumably referred to by Petitioners was actually calendared in early November 1992, nearly four weeks after the hearing on the motion to convert. This was a continued hearing on the adequacy of the Petitioners' disclosure statement. Petitioners had yet to even file their second amended disclosure statement, as ordered by the bankruptcy court on September 17, 1992.

2. Compromises of Controversies.

Approximately two months after the conversion, the Trustee, on behalf of the Estate, settled the Pre-Petition Claims against SOTA,[1] RSC[2], and co-defendant T.A. Associates Partners ("T/A"). Pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure, and after numerous hearings in which Petitioners actively participated, the bankruptcy court approved the Estate's settlement with RSC on March 24, 1993, and the settlements with SOTA and T/A on May 19, 1993. Petitioners filed a notice of appeal from these settlement orders on May 24, 1993.

On April 13, 1994, the bankruptcy court entered an order approving the Trustee's settlement with Frank A. Barcott

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1. SOTA agreed to release all of its claims against Petitioners and pay the Estate $100,000 in return for a release of all of the Pre-Petition Claims. SOTA recognized that, in light of Petitioners' bankruptcy and the accompanying lack of unencumbered assets, SOTA's further expenditure of legal fees likely would not result in a monetary recovery.

2. RSC agreed to pay the Estate $10,000 in return for a release of all of the Pre-Petition Claims. At a mandatory settlement conference held on July 17, 1992 in the Superior Court actions, Judge Thomas Thrasher of the Orange County Superior Court recommended that RSC pay $5,000 as "nuisance value" to settle the Petitioners' claims against them.

Security and Investigations ("Barcott"), the final defendant in the Petitioners' Superior Court action. Petitioners filed a notice of appeal from this settlement order on April 18, 1994.

3. Motions for Turnover Order and to Use Property of the Estate out of the Ordinary Course of Business.

Pursuant to its settlement with SOTA, the Estate agreed to release all Pre-Petition Claims against SOTA belonging to Petitioners' wholly owned corporation, In-Communications, Inc. ("ICI").[3] In furtherance of the Estate's obligations, the Trustee moved the bankruptcy court for an order directing Petitioners to turn over, *inter alia*, all documents in Petitioners' possession concerning ICI, including Petitioners' original stock certificates. Petitioners refused to comply with the bankruptcy court's order, and, on May 13, 1993, filed a notice of appeal.

The Trustee, on behalf of the Estate and as the sole shareholder of ICI by virtue of the Petitioners' bankruptcy filing and case conversion, later voted the Estate's shares to amend the bylaws of ICI, appoint new directors, and approve ICI's release of ICI's pre-petition claims against SOTA. The Trustee's action did not affect ICI's post-petition claims, if any.

On July 19, 1993, the Trustee sought bankruptcy court approval of his use of the Estate's interest in ICI. On September 29, 1993, the bankruptcy court entered an order granting the Trustee's motion and specifically ratified the Trustee's execution of all corporate formalities necessary for ICI to release its pre-petition claims against SOTA. On October 12, 1993, Petitioners appealed that order.

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3. The release from ICI ensured a termination of all litigation between Petitioners and SOTA. In an abundance of caution, SOTA sought to avoid a subsequent lawsuit by a Petitioner-controlled entity, re-alleging previously released claims.

4. District Court Appeals.

In two separate decisions, entered June 6, 1994, and September 20, 1994, the United States District Court for the Central District of California, the Honorable Gary L. Taylor presiding, affirmed all of the bankruptcy court's orders from which Petitioners had noticed appeals. Judge Taylor refused to address Petitioners' asserted errors regarding the conversion of their chapter 11 case. Judge Taylor held that Petitioners' failure to notice an appeal from that order deprived him of jurisdiction to consider the order's merits. Petitioners noticed appeals from Judge Taylor's rulings to the Court of Appeals for the Ninth Circuit.

5. Ninth Circuit Appeal.

In an unpublished decision entered April 16, 1997, the court of appeals affirmed Judge Taylor's decisions. In its opinion, the court of appeals also refused to consider the merits of the order converting Petitioners' chapter 11 case, because Petitioners failed to file a timely notice of appeal.

REASONS FOR DENYING THE WRIT

Petitioners devote the majority of their argument in support of certiorari to contentions that the bankruptcy court lacked jurisdiction over the Estate, and in particular, over the Pre-Petition Claims. Petitioners specifically contend that: (1) the bankruptcy court unlawfully converted their chapter 11 case to a case under chapter 7; (2) as a result of the illegal conversion, any subsequent orders affecting property of the Estate exceeded the bankruptcy court's jurisdiction; and (3) the bankruptcy court lacked subject matter jurisdiction to approve the settlement of the Pre-Petition Claims.

For the reasons stated below, the bankruptcy court lawfully converted Petitioners' case; the bankruptcy court possessed subject matter jurisdiction to enter each of the challenged orders; and Petitioners' contentions lack merit as well as supporting legal authority. Petitioners certainly advance none of the reasons, as set forth in Rule 10 of the Supreme Court of the United States, for this Court to exercise its discretionary review of this case.

I.

THE PROVISIONS OF TITLE 11 SUPERSEDE ANY STATE-CREATED RIGHT PETITIONERS POSSESSED IN THEIR PRE-PETITION CLAIMS UPON THE FILING OF PETITIONERS' BANKRUPTCY PETITION.

Petitioners contend that the Trustee and bankruptcy court unconstitutionally deprived them of property rights created by California law. This argument lacks any basis in the United States Constitution or federal law. Article I of the United States Constitution specifically grants to Congress the power to establish uniform laws on the subject of bankruptcy. United States Const. art. I, § 8, cl. 4. Article I particularly authorizes Congress to provide for a uniform set of rules and procedures for the administration of bankruptcy estates. *New York v. Irving Trust Co.*, 288 U.S. 329, 332 (1933). Any state law to the contrary must yield to the plenary bankruptcy power of Congress. United States Const. art. VI, cl. 2; *National Collection Agency, Inc. v. Trahan*, 624 F.2d 906 (9th Cir. 1980).

Petitioners' argument that Congress lacks the power to abrogate state-created rights when providing for a uniform system of bankruptcy laws contradicts the express terms of Articles I and VI of the United States Constitution. Bankruptcy proceedings constantly modify and affect property rights established by state law. *Wright v. Union Cent. Life Ins. Co.*,

304 U.S. 502, 517 (1938). As a result, property rights gain no absolute invoidability in the bankruptcy court simply because they were created or protected by state law. *Id.* at 518. If Congress acts within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights. *Id.*; *See also In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986).

Petitioners also contend that the property of a chapter 11 "debtor in possession" is not subject to the bankruptcy or district court's subject matter jurisdiction under title 11. This argument also lacks any basis in federal law. The bankruptcy jurisdictional statutes draw no distinction between filings under the different chapters of title 11. 28 U.S.C. §§ 1334, 157 (1993). Section 1334(e) of title 28 provides that the district court in which "a case under title 11" is commenced or pending shall have exclusive jurisdiction of property of the debtor and the estate, while section 157(b)(2)(A) grants bankruptcy courts subject matter jurisdiction over the "administration of the estate."

The provisions of title 11 expressly contradict Petitioners' purported distinction between the status of "property of the estate" in chapter 11 and chapter 7. A chapter 11 "debtor in possession" has nearly the same rights and obligations as a chapter 7 or chapter 11 trustee. 11 U.S.C. §§ 1106, 1107 (1993); *In re March*, 995 F.2d 32, 34 (4th Cir. 1993). Section 103(a) of title 11 provides that the provisions of chapter 5, including section 541 (property of the estate), apply in cases filed under *both* chapter 7 and chapter 11.

Petitioners suffered no cognizable deprivation of any right to property under either federal or state law. This Court should therefore deny the Petition.

II.

THE ORDER CONVERTING PETITIONERS' CHAPTER 11 CASE WAS PROPER AND CONSTITUTED A FINAL ORDER FROM WHICH PETITIONERS FAILED TO FILE A TIMELY NOTICE OF APPEAL.

A. This Court, Like the Courts Below, Lacks Jurisdiction to Entertain the Merits of Petitioners' Appeal from the Order of Conversion.

Petitioners' vehemently contend that the bankruptcy court improperly converted their chapter 11 case to a proceeding under chapter 7. Petitioners, however, failed to notice an appeal from the order converting their case. An aggrieved party must file a notice of appeal from a final order or judgment of a bankruptcy court within ten (10) days of the date of the entry of the order or judgment appealed from, or if the party timely files a motion under Rule 9023 of the Federal Rules of Bankruptcy Procedure within ten (10) days from the entry of the order denying that motion. Fed. R. Bankr. P. 8001(a), 8002(b) (Supp. 1997); *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 826-27 (B.A.P. 9th Cir. 1986).

The time limits established for filing a notice of appeal are mandatory and jurisdictional. *In re Souza*, 795 F.2d 855, 857 (9th Cir. 1986); *Curry and Sorensen*, 57 B.R. at 826. The order converting Petitioners' case constituted a final order. *In re Firstcent Shopping Center, Inc.*, 141 B.R. 546, 550 (S.D.N.Y. 1992); (order converting case is a final and appealable order); *In re Rebeor*, 89 B.R. 314, 321 (Bankr. N.D.N.Y 1988) (same). As Petitioners failed to file any notice of appeal from the order converting their chapter 11 case, this Court, like the district court and the court of appeals, lacks jurisdiction to entertain Petitioners' argument on the merits.

B. Petitioners' Attempted Collateral Attack of the Conversion Order is Improper.

Although they fail expressly to assert any justification for their failure to seek timely review of the Conversion Order, Petitioners assert that the Order is void for lack of subject matter jurisdiction. In particular, Petitioners argue that a motion to convert a chapter 11 case over the objections of a debtor necessitates the same numerical quota of moving creditors and finding of insolvency as would be required to commence an involuntary case against a debtor under Bankruptcy Code section 303. The requirements of section 303 were not met, Petitioners assert, and therefore the bankruptcy court lacked subject matter jurisdiction to convert their case — a defect which may be raised at any time. (Petition, p. 11.)

Petitioners' argument blurs the distinction between *void* and *voidable* orders. Eligibility or qualification to be a debtor lacks jurisdictional significance. *First Brandon Nat. Bank v. Kerwin-White,* 109 B.R. 626, 629 (D. Vt. 1990); *In re Johnson,* 13 B.R. 342, 347 (Bankr. D. Minn. 1981). The number or status of creditors filing a petition under section 303 is, as a matter of law, completely unrelated to the bankruptcy court's subject matter jurisdiction. *In re Mason,* 709 F.2d 1313, 1318 (9th Cir. 1983) (filing of a petition by only two creditors does not deprive bankruptcy court of jurisdiction); *In re Hutter Assoc., Inc.,* 138 B.R. 512, 516 (W.D. Va. 1992) (filing of a petition by one creditor against a debtor with more than twelve holders of claims does not deprive bankruptcy court of jurisdiction).

The filing of the petition that commences a bankruptcy case is the act that gives the bankruptcy court jurisdiction. *Johnson,* 13 B.R. at 347; *see also Canute Steamship Co. v. Pittsburgh Coal Co.,* 263 U.S. 244, 248 (1923) ("[T]he filing of a petition, sufficient on its face, . . . clearly gives the bankruptcy court

jurisdiction of the proceeding."). Defects in an involuntary petition are merely defenses, which debtors waive if they do not timely assert them. *Mason*, 709 F.2d at 1318; *Hutter Assoc.*, 138 B.R. at 516; *In re Barth*, 109 B.R. 570, 574 (Bankr. D. Conn. 1990).

By filing their chapter 11 petition, Petitioners consented to the bankruptcy court's jurisdiction over Petitioners and the Estate. *Wilson v. Bill Barry Enterprises, Inc.*, 822 F.2d 859, 861 (9th Cir. 1987). Pursuant to 28 U.S.C. § 157(b), the bankruptcy court possessed jurisdiction over all "core" proceedings in the Petitioners' case. Motions to dismiss or convert constitute "core" proceedings, as these motions involve the administration of a debtor's estate and affect the adjustment of the debtor-creditor relationship. *In re Hemex Liquid. Trust*, 129 B.R. 91, 92 (Bankr. W.D. La. 1991).

The bankruptcy court therefore possessed subject matter jurisdiction to convert the Petitioners' case to chapter 7. Any contentions Petitioners may have had regarding the propriety of the conversion fail to amount to jurisdictional defects. The order of conversion, therefore, constitutes a valid and final order.

C. Petitioners' Argument Misreads the Express Terms of 11 U.S.C. § 1112.

Petitioners base their collateral attack against the conversion order on subdivision (f) of 11 U.S.C. § 1112, which prohibits conversion to a particular chapter "unless the debtor may be a debtor under such chapter." Petitioners argue that, because the United States trustee could not have filed an involuntary petition under chapter 7 against them under 11 U.S.C. § 303(b), the bankruptcy court could not involuntarily convert their chapter 11 case. Petitioners also assert that an involuntary conversion requires the same determination of "insolvency" as a petition under 11 U.S.C. § 303(h). Petitioners are wrong.

The purported parallel between sections 303 and 1112 disregards, and conflicts with, the clear meaning of section 1112. Section 1112(b) requires neither a finding of insolvency nor a numerical quota of creditors who must file or join a motion to convert. Section 1112(b) merely provides that a motion to convert may be brought by "a party in interest or the United States trustee[,]" and the court, in ordering a conversion, need only determine the existence of the requisite "cause."

Petitioners' argument also conflicts with the clear meaning of section 1112(f). That section does not restrict conversion to a chapter "under which a petition could be filed against the debtor." The court only may not convert a case, "unless the debtor *may be a debtor* under such chapter." 11 U.S.C. § 1112(f) (1993) [emphasis added]. Specific statutory language defines who "may be a debtor" under chapter 7. Section 109(b) provides that any person, other than railroads, insurance companies and lending/depository institutions, may be a chapter 7 debtor. Petitioners are "persons" as defined in section 101(41), and do not fall into any of the exclusive categories contained in section 109(b)(1)-(3). The bankruptcy court relied on clear, express statutory authority in converting Petitioners' chapter 11 case to a case under chapter 7 on motion of the United States trustee. This Court should deny the Petition.

III.

THE BANKRUPTCY COURT ACTED WITHIN ITS JURISDICTION IN APPROVING A COMPROMISE OF PETITIONERS' PRE-PETITION CLAIMS.

A. The Trustee Possessed Authority to Settle the Pre-Petition Claims.

When Petitioners filed their chapter 11 petition, the Pre-Petition claims became property of the Estate. 11 U.S.C. § 541(a)(1) (1993) (upon the filing of a petition "all legal or equitable interests of the debtor" become property of the estate); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983) (causes of action are property of the estate); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705 (9th Cir. 1986) (same). Upon the conversion of the case to a chapter 7 proceeding, the Trustee must "collect and reduce to money the property of the estate for which such trustee serves and close such estate as expeditiously as is compatible with the best interests of the parties in interest." 11 U.S.C. § 704(l) (1993). This mandate required that the Trustee seek resolution of the Pre-Petition Claims, which the Trustee did by settling them.

Petitioners, dissatisfied with the course of events flowing from their voluntary decision to petition for bankruptcy protection, concoct a fanciful scheme of intrigue and deception. According to Petitioners, the Trustee conspired with the other parties so that the Trustee could "walk away with his pockets full," while releasing the other parties of any liability. Petitioners offer no evidence whatsoever, much less point to any evidence in the record, to support this theory. The actual facts of this case, as set forth in the record, are fairly routine and certainly fail to call into question the underpinnings of the United States Constitution. Petitioners voluntarily filed a chapter 11 petition,

which the bankruptcy court properly converted to a chapter 7 proceeding. Upon conversion, the court appointed a trustee, and that Trustee acted, as required, to expeditiously liquidate Petitioners' Estate for the benefit of Petitioners' creditors. These actions necessarily included settling the Pre-Petition Claims.

B. The Bankruptcy Court Properly Approved the Trustee's Settlement of the Pre-Petition Claims.

Petitioners take issue with the ninth circuit's affirmance of the orders approving the settlements of the Pre-Petition Claims. Their argument fails completely in light of the facts of these proceedings, as the argument rests upon the faulty assumption that Petitioners remained chapter 11 "debtors in possession." As discussed above, the bankruptcy court properly converted Petitioners' chapter 11 case to a proceeding under chapter 7; thus, the Trustee's liquidation of the Pre-Petition Claims was an otherwise straightforward administration of Petitioners' bankruptcy estate. The bankruptcy court supervised the Trustee's administration of Petitioners' Estate pursuant to the court's express statutory jurisdiction. "[M]atters concerning the administration of the estate" constitute core proceedings, 28 U.S.C. § 157(b)(2)(A), properly heard by the bankruptcy court. 28 U.S.C. § 157(b)(1) (1993). *See W.J. Services v. Commercial State Bank*, 990 F.2d 233, 234 (5th Cir. 1993) (approval of compromise of claims of the estate is a core proceeding subject to the jurisdiction of the bankruptcy court); *In re Holywell Corp.*, 913 F.2d 873, 881 (11th Cir. 1990) (same).

Petitioners assert that the bankruptcy court lacked jurisdiction to approve the settlement of the Pre-Petition Claims, because these included claims for personal injury. Petitioners also attack the ninth circuit for affirming the bankruptcy court's decision, suggesting that well established ninth circuit case law, *e.g.*, *Sierra Switchboard*, *supra*, violates their constitutional due

process protections.[4] However, precedent holding that the property of an estate in bankruptcy includes a debtor's personal injury causes of action does not amount to an unconstitutional aberration. It finds direct support in the Bankruptcy Code (11 U.S.C. § 541(a)), the decisional law of many circuits (*see e.g., Tignor v. Parkinson*, 729 F.2d 977, 980-81 (4th Cir. 1984); *Vreugdenhil v. Hoekstra*, 773 F.2d 213, 215 (8th Cir. 1985)) and the holdings of this Court. *E.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983).

The bankruptcy court properly reviewed and approved the Trustee's settlement of the Pre-Petition Claims. No infringement on the sovereignty of the California courts occurred. In its review, the bankruptcy court specifically avoided an adjudication of the merits of the Pre-Petition Claims. The court only evaluated the Trustee's settlements "to determine if [they fell] below the lowest point in the range of reasonableness." *In re Hydronic Enterprise, Inc.*, 58 B.R. 363, 366 (Bankr. D.R.I. 1986). Such a review constituted a "core proceeding," well within the bankruptcy court's express jurisdiction. *See W.J. Services v. Commercial State Bank, supra*, 990 F.2d at 234; 11 U.S.C. § 105(a) (1993) (authorizing the bankruptcy court to issue any order, process or judgment needed to carry out the provisions of title 11).

Since liquidating and administering Petitioners' estate for the benefit of their creditors necessitated a resolution of the Pre-Petition claims, the Trustee acted properly and within his authority. It follows then that, as part of the administration of the estate, and as a core proceeding, the bankruptcy court possessed jurisdiction to approve the settlements.

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4. Similarly, Petitioners' suggestion that section 157(b)(5) of Title 28 guarantees their right to a jury trial of personal injury tort claims is misplaced. This section simply *permits* a jury trial for claims not settled in bankruptcy, such as those in which the debtor is the defendant.

IV.

THE BANKRUPTCY COURT PROPERLY APPROVED THE TRUSTEE'S USE OF THE STOCK OF PETITIONERS' WHOLLY OWNED CORPORATION.

In July 1993, the trustee exercised the Estate's interest in Petitioners' wholly owned corporation, In-Communications, Inc. ("ICI"), to effectuate a release of ICI's pre-petition claims, if any, against Respondents. The bankruptcy court then approved the Trustee's use of Petitioners' interest in the ICI stock, pursuant to 11 U.S.C. § 363(b). Petitioners challenge the bankruptcy court's Order on the grounds that the Trustee's actions violated ICI's corporate by-laws and California corporate law. Petitioners provide absolutely no authority, in either fact or law, for their positions. Their arguments must fail.

Petitioners' Estate included all property in which they had a legal or equitable interest at the time they sought bankruptcy protection. 11 U.S.C. § 541(a)(1) (1993). Petitioners' Estate included all of the then-outstanding shares in ICI. *See In re Deak & Co.*, 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986). A corporation wholly owned by a debtor upon the filing of a bankruptcy petition becomes an asset of the bankruptcy estate. *In re Baker*, 68 B.R. 360, 363 (Bankr. D. Or. 1986). The bankruptcy court accordingly possessed jurisdiction to approve the Trustee's administration of this Estate asset.

Petitioners assert that the Trustee's actions violated ICI's corporate bylaws and California law. Petitioners fail to cite to any evidence in the record, nor have they presented any authority, in support of this argument. To the contrary, as the sole shareholder of ICI by virtue of the conversion of Petitioners' chapter 11 case, California Corporations Code section 603 (actions without meeting upon consent of shareholder)

specifically authorized the Trustee's actions. This Court should deny the Petition.

CONCLUSION

Petitioners' various arguments that the challenged bankruptcy court orders deprived Petitioners of their constitutional rights lack any merit. Pursuant to Articles I and VI of the United States Constitution, Congress retains authority to provide for a uniform bankruptcy system, even at the expense of a debtor's state-created property rights. Congress, in turn, granted to the district and bankruptcy courts express jurisdiction over the property and cases of title 11 debtors (whether they be debtors or "debtors in possession").

In this case, the bankruptcy court acted well within this express statutory grant of authority. The bankruptcy court properly exercised its sound discretion, pursuant to section 1112 of title 11, in converting Petitioners' chapter 11 case to a proceeding under chapter 7. Petitioners waived their right to challenge that exercise of discretion by failing to file a notice of appeal. Petitioners' contention that the court unlawfully converted their case, thereby divesting itself of jurisdiction, lacks any legal authority and contradicts Congress's express and constitutional statutory scheme.

Petitioners' contention that the bankruptcy court orders compromising the Pre-Petition Claims deprived Petitioners of property without due process finds no support in existing law. The courts below did not unconstitutionally deprive Petitioners of any right to pursue the Pre-Petition Claims. Upon Petitioners' voluntary filing of a chapter 11 petition, the ability to pursue those claims vested in Petitioners' Estate, subject to the statutory jurisdiction of the bankruptcy court.

The bankruptcy court also properly authorized the Trustee to vote Petitioners' shares in their wholly owned corporation. The shares constituted property of Petitioners' Estate, subject by express grant of statutory authority, to the Trustee's administration, upon approval of the bankruptcy court.

Petitioners have failed to justify this Court's discretionary review of their case. This Court should deny the Petition.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term 1996

CHARLES G. MILDEN and
SUSAN P. MILDEN, debtors,
Petitioners,

vs.

JAMES J. JOSEPH, Trustee,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

***

PETITIONERS' REPLY TO RESPONDENTS' TWO BRIEFS IN OPPOSITION TO THIS PETITION

***

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REPLY

On or about September 22, 1997, Respondents State of the Art, Inc. (SOTA), Robertson Stephens & Co. (combined with SOTA), and separately Frank A. Barcott, dba Frank A. Barcott Security and Investigations, filed their respective briefs opposing this Petition for Writ of Certiorari to the United States Supreme Court.

Both Respondents have alleged in their briefs that petitioners have incorrectly stated the questions sought to be reviewed, and each brief portends to submit other questions instead. The Respondent-restated questions and Petitioners' responses to their restatement are as follows:

> 1(a). [Barcott] *"Whether Petitioners may argue that the underlying bankruptcy was wrongfully converted to a Chapter 7 proceeding when they did not timely appeal from the conversion order?"*
>
> 1(b). [SOTA/Robertson Stephens] *"Does the federal district court, the court of appeals, or this Court have jurisdiction to entertain the merits of Petitioners' appeal from the bankruptcy court's order converting their case from chapter 11 to chapter 7, where Petitioners failed to file a notice of appeal from that order?"*

Response: Petitioners were empowered under Rule 9024 F.R.Bktcy.P to file motions pursuant to Rule 60(b)(2) and Rule 60(b)(4), as circumstances may have warranted. Circumstances did warrant so, and Petitioners made the appropriate argument to the lower courts. See Petition at pp. 11.

Whether or not the conversion of this specific case was authorized under law required the federal courts to view the statutory language of 11 U.S.C. §1112 in terms of the operative limitations of the First, Fifth, Seventh, and Tenth Amendments, as generally set forth in Petition at pp. 8-15, and embraced in each of the five Questions Presented for Review by Petitioners. These issues have all been posed to the lower courts below, and ignored by each of the federal

judges involved. Instead of dealing directly with Petitioners' issues, the lower courts have relied upon their own prior decisions involving different circumstances as controlling upon Petitioners' arguments.

The Respondent-proposed framing of this question pivots upon the term "jurisdiction" and fails to adequately present the constitutional issues brought here that bankruptcy law *as applied* has violated private rights retained by debtors under title 11, and protected by the U.S. Constitution regardless of whether a statute is constitutional, or bankruptcy jurisdiction appropriate, under other circumstances.

> 2(a). [Barcott] *"Whether the bankruptcy and district courts had jurisdiction to approve the trustee's settlement of the estate's state court lawsuit?"*
>
> 2(b). [SOTA/Robertson Stephens] *"Did the bankruptcy court have subject matter jurisdiction to approve a settlement of a state court action filed pre-petition by Petitioners?"*

Response: The record is clear below that the bankruptcy judge made his order predicated upon the alleged trustee's assurances that the proposed settlement of a pending state court action was warranted. "Jurisdiction" generally defined is the power to decide an issue one way or the other.[1]

By definition above, all "jurisdiction" to look at and form any manner of opinion upon the merits of a case involving residents of California, doing business in California, and arising under the laws of the State of California, was vested in the California Superior Court where the case upon the issues duly claimed for litigation was pending, and a jury trial had been duly demanded.

---

1 Black's Law Dictionary in relevant part states: "A term of comprehensive import embracing every kind of judicial action. Federal Land Bank of Louisville, Ky. v. Crombie, 258 Ky. 383, 80 S.W.2d 39, 40. It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 ...."

The U.S. Bankruptcy Court, where no action to remove the case from state court had been filed, not only lacked any cause to presume jurisdiction over the subject matter or parties in that case, but was barred from conducting a jury trial.

Any information relating to the merits of the case that may have been presented to the bankruptcy judge was hearsay information outside the court of competent jurisdiction. The case pending in state court is comprised of substantial issues involving personal injury to the physical, mental and emotional well being of Petitioners, as well as further issues of shareholder fraud under California securities law.

For the reasons set forth in Petition at pp. 15-19, substantial damages were sustained to the persons of the Petitioners, and thereby were damages not sustained to the property of the Petitioners. Such damages were not property of the estate because they were not damages to "property" as meant under common law. See Petition at 22-25.

The Respondent-proposed framing of this question pivots upon the term "jurisdiction" and fails to adequately present the constitutional issue brought here that case law *as applied* has violated private rights retained by debtors under title 11, and protected by the U.S. Constitution regardless of whether or not a statute is constitutional, or bankruptcy jurisdiction appropriate, under other circumstances.

3. [SOTA/Robertson Stephens] *"Did the bankruptcy court have subject matter jurisdiction to approve the Trustee's use of the stock of a corporation, wholly owned by Petitioners pre-petition, to effect a release of the corporation's claims against third parties?"*

Response: 28 U.S.C. §959(b) commands a trustee to *".. manage and operate the property in his possession as such trustee ... according to the requirements of the valid laws of the State in which such property is situated ..."* The Respondents have conceded in the text of their brief that the acts of the alleged trustee have been committed in violation of the laws of *"... the State in which such property is situated*

...", but claim along with the federal courts of the Ninth Circuit that prior federal court decisions are superior to the laws of the State of California. Article I, Sec. 8, cl. 4 of the Constitution of the United States empowers Congress to write the uniform laws on bankruptcy. This includes the plenary power to impair the obligations of contracts, but it does not include the power to override non-contract state law. See: Article X of the Articles of Amendment to the Constitution of the United States.

This general issue arises under Petition Questions 1, 2, and 5, but it extends beyond the Petitioners to the rights of other entities never noticed or made subject to the personal jurisdiction of the federal court system in California. The activity of the alleged trustee was perpetrated against the post-petition continuing interests of the debtor petitioners, as well as the business interests of a California corporation that is not a party to any case under title 11. This issue presents a serious disregard of corporate by-law procedures, California State law, and federal statutory law upon the use of assets of an estate by a fiduciary. The alleged trustee has presented as his sole argument that the action he took against a third party corporation outside the personal jurisdiction of the bankruptcy court was condoned by the bankruptcy judge and title 11 because he needed to impair this third party's property right in order to protect the Respondents from liability to the third party corporation at trial outside the Petitioners' reorganization.

The Respondent-proposed framing of this question pivots upon the term "jurisdiction" and fails to adequately present the constitutional and federal statutory issues brought here that case law ***as applied*** has violated private rights retained by debtors under title 11, and protected by the U.S. Constitution regardless of whether or not a statute is constitutional, or bankruptcy jurisdiction appropriate, under other circumstances.

Other matters raised by the Respondents Briefs:

1. Neither the alleged trustee, nor the government, have filed a brief in opposition. This circumstance leaves the Respondents (who have struck the compromise deal whereby they would compensate the alleged trustee the sum of

$145,000.00) to vehemently protest an appeal by Petitioners that is directed at obtaining a reversal of the conversion and dismissal of their own personal Chapter 11 proceeding. Respondents are also curiously and vehemently opposed for Petitioners to enforce their right to face a jury at a state trial where SOTA has alleged a $6 million damages claim against Petitioners. Respondent SOTA's argument that *"Rather than face the jury they now claim to demand,..."* flies in the face of the record in the bankruptcy court, the district court and the appeal filed with the Ninth Circuit of Appeals where Petitioners have continually asserted their right to and demand for a jury trial.

2. Respondents have been somewhat less than gentlemanly in their harsh and unsupported attack upon Petitioners' motives, deeds and character. Petitioners wish to deal with these false allegations at a trial.

It is nevertheless a fact that Rutan and Tucker are presently the attorneys of record for SOTA. It is also a fact that they were the attorneys of record during SOTA's fraudulent Initial Public Offering ("IPO"). It is also a fact as attorneys of record Rutan and Tucker necessarily knew of the false representations which were made in a S-1 Registration Statement filed with the U.S. Securities and Exchange Commission and Prospectus provided to prospective SOTA shareholders relating to the past sales value of SOTA stock that far exceeded what was represented (and conveyed) to Petitioners. It is also a fact that Robertson Stephens was the investment banker for SOTA during the fraudulent IPO. Even more interesting, Robertson and Stephens controlled a seat on the Board of Directors for SOTA and as such were SOTA insiders when establishing the price to be paid for Petitioner Charles Milden's stock. It is also a fact that just prior to SOTA's IPO, SOTA hired Barcott to harass, stalk and spy upon Petitioners under the color or law and to spread rumors in their neighborhood that were false and damaging to Petitioners' reputation. It is also a fact that shortly after the episode with Barcott and the filing of a law suit by SOTA the Petitioners discovered that SOTA had defrauded its founder (Petitioner Charles Milden) in an amount greater than $800,000 when they repurchased his stock.

Petitioners do not have the dirty hands in this case, but the Respondents do. The Court should be very concerned over whether the lower courts are being used by entities who have no lawful interest in a personal reorganization under title 11 other than to further their own alleged untoward interests at the expense of the estate.

3. Much has been made of Petitioners' "voluntary" petition status as analogous to a waiver of all civil rights. Petitioners have never waived their civil rights. Petitioners sought only to avail themselves of Congress' declared intent to extend its power to impair the obligations of contract to those who required only a temporary impairment of personal contract obligations. That is why Petitioners "voluntarily" filed a petition for temporary relief under Chapter 11 of title 11.

CONCLUSION

Petitioners have come to the United States Courts for honorable purposes during a period of great personal duress. Petitioners came upon the invitation of Congress who had declared the intention of providing relief from financial burdens long enough to reorganize one's obligations and to honorably meet them.

It is with great sadness that Petitioners report that they have found the congressional promise to have been emptied by the appointees and officers of the very courts Congress intended to carry out its will.

Respondents have presented absolutely no reason why this Petition should not be granted. The Court should grant this Petition to stem the misapplication of law that has resulted in the depravation of rights of the Petitioners as protected by the Constitution of the United States. Granting this Petition would be a constructive step toward stemming the problems of Bankruptcy administration as identified by Congress (See Petition pp. 26-27) and have the added benefit of beginning to remove the stain of cronyism and abuse of innocent people.

Dated: September 30, 1997 Respectfully submitted,

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